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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

NO. 881

GEORGE HARRIS, ET, AL.,

Petitioners,

versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY,

Respondent.

Petition for Writ of Certiorari and Brief in Support of Same.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

NO. _____

GEORGE HARRIS, INDIVIDUALLY AND AS THE DESIGNATED AGENT IN WRITING OF ELLIS DANIEL,

PETITIONER.

VS.

L. C. HAMMOND & COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner George Harris, individually and as the designated agent in writing of Ellis Daniel, respectfully shows to the court:

STATEMENT OF MATTER INVOLVED:

1. The Proceedings In The Lower Courts:

This petition for a writ of certiorari is sought to review a final judgment of the Circuit Court of Appeals for the 5th Circuit, which court affirmed a final judgment of the United States District Court, Southern District of Georgia, Augusta Division, Honorable Archibald B. Lovett, presiding.

The action brought by petitioner herein was to recover the minimum wages provided for under the Fair Labor Standards Act of Congress, from the employer, L. C. Hammond & Company, whom it was alleged was a wholesale merchant actively and extensively en-

gaged in interstate commerce, and in connection with which business petitioners were exclusively employed; that their employer had willfully evaded the law and refused to pay said minimum wages and was indebted to petitioners in the sum of $9,722.18 (R.2).

The defendant answered denying that he was engaged exclusively in the wholesale business in commerce, and alleged that he was primarily engaged in a retail establishment (R.7).

Petitioners failed to demand a jury trial and the case was tried by his Honor, the District Judge, the Honorable Archibald B. Lovett.

2. The Facts Of The Case

The substantial uncontradicted documentary and other evidence adduced are as follows: During the period of petitioners' employment, to-wit: On February 15, 1939, the defendant made an affidavit to procure a business license to do a wholesale business only, and in which affidavit he swore that he did a wholesale business only (R.33).

On January 18, 1940 during petitioners' employment the defendant made another affidavit to procure a license to do a wholesale business only, and in which he swore that he did a wholesale business only (r.34).

The defendant testified that the City of Augusta, Georgia licensed him to do a wholesale business only (R.23). His delivery trucks and stationery advertised him as a wholesale merchant only (R.11-15). He advertised himself in Augusta, City Directories and telephone directories as a wholesale merchant only (R.26). His only retail business was done in the office space of his wholesale business measuring 35 x 40 feet. His office and warehouse extended through a city block.

He purchased from eight or ten commission brokers, representing manufacturers and producers, and in carload lots, various

kinds of groceries, feeds, cement and hardware, shipped to him in interstate commerce (R. 12-17). During the period of petitioners' employment defendant had as regular customers 143 retail merchants, 71 of whom were in the State of South Carolina, and 82 in the State of Georgia (R.33). Petitioner and McDaniel worked 76 hours per week for which they received $11.00 per week or approximately 14¢ an hour straight time (R.16).

Petitioner and McDaniel, as warehousemen worked practically all the time in the warehouse, hauling in by trucks interstate shipments from railroads, and delivering by truck from the warehouse consignments of goods sold by defendant to retail merchants in South Carolina and Georgia (R.14-17). Defendant at all times had a traveling salesman who sold goods to retail merchants in wholesale quantities (R. 10).

During the trial of the case in the District Court and while petitioners were proceeding to prove by retail merchants, who were customers of the defendant, the volume of wholesale business done by defendant in commerce, his Honor the District Judge cut short petitioners' proof by the following ruling, duly excepted to by petitioners:

By the Court: "Are these witnesses Mr. Chance for the purpose of establishing the character of business as wholesale or retail?" Mr. Chance: "To show that they were primarily purchasing goods from Hammond as a wholesale merchant in volume". By the Court: "I will limit you to three witnesses. It is cumulative testimony". (R.19).

During the trial his Honor the District Judge elicited from defendant the following hearsay testimony: By the Court: "There was some reference made to the Wage and Hour people calling on you, do you remember the date?" A. "Not definitely". The

Court: "Don't you know the year?" A. "I think it was in the Fall of 1939". The Court: "That would be about a year after the law went into effect". A. "Yes sir". The Court: "Did they leave or write any letter or have any document showing how they interpreted your business and whether it was subject to the Act?" A. "No sir," the only thing Mr. Boye contacted us and we talked." The Court: "What was the Inspector?" A. "Yes sir". The Court: "Did the Inspector tell you whether you were classified as a retailer or a wholesaler?" A. "no sir, just said we were doing a little less than 20% of wholesale."

3. Decision Of The District Court

Under the heading "DISCUSSION" wherein the District Judge begins his decision against petitioners he says: "There are two questions for decision. The first is are those employees engaged in a retail establishment, the greater part of whose selling is in intrastate commerce, with respect to whom by Section 13 (a) (2) of the Act, Sections 6 and 7 are made applicable. Secondly, if they are not, if the defendant is a wholesaler, are these employees covered by the Act in all of their activities; were they wholly in commerce and entitled to invoke the Act for all of the services they rendered, or only where the service had some immediate relationship to interstate commerce?" (R.39).

"By the express terms of the Act, Congress said that the provisions of Sections 6 and 7 relating to minimum wages and overtime compensation should not apply with respect to (2) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce. As to wholesalers, all phases of this business selling intrastate are not necessarily covered by the Act, because the purchases are made interstate." (R.39-40).

The trial Court decided that the defendant conducted a retail establishment in connection with their wholesale business, and that petitioners were precluded under the Act, but he concludes as follows:

"But there are other aspects of the case which for the future guidance of the parties properly may be discussed briefly. One of these relates to the overtime compensation claimed by the truck driver and his helper while engaged in hauling goods from the railroads to the defendant's warehouse. While so engaged for a substantial portion of the time, if it had been a wholesaler, they would have been engaged in interstate commerce and within the coverage of the minimum wage provisions of the Act, but without the overtime provision."

4. The Appeal Proceedings Below.

From the final judgment of the District Court, dated August 28, 1943, petitioner entered an appeal to the Circuit Court of Appeals for the 8th Circuit, and in connection with which the following occurred:

April 20, Final Judgment for Defendant (R.46).

October 14, Notice of Appeal served and filed (R.47).

October 14, Assignment of Errors served and filed (R.48).

October 14, Designation of record on Appeal served and filed (R.54).

October 14, Appeal allowed (R. 53).

October 30, Certificate of Clerk to record (R.56).

5. Decision Of Circuit Court Of Appeals.

In a short two page decision the Circuit Court of Appeals affirmed the judgment of the trial court, without reference to or a discussion of any question or issue raised by appellant's assignment of errors. (R.58).

6. Jurisdiction of This Court.

The statutory provisions relied upon to sustain the jurisdiction of this court is the Acts of Congress know as the Fair Labor Standards Act (29 USCA Sec.201, et sequitur), under authority of which this action was brought.

7. Questions Presented.

(a). Where an employer is admittedly engaged in the wholesale purchase, sale and distribution of goods, wares and merchandise in commerce, and has employees who work exclusively in that business, do such employees come within the minimum wage provisions of the Fair Labor Standards Act?

(b) May such an employer avoid the provisions of said Act, where he also maintains in the office space of his wholesale business a small retail stock which he sells at retail, but in which his wholesale employees have no duties to perform?

(c) Is the following statement which the trial court used as the premise for his rulings, a correct statement: "If the defendant is a wholesaler, are these employees covered by the Act in all of their activities; were they wholly in commerce and entitled to invoke the Act for all of the services they rendered, or only where the service had some immediate relationship to interstate commerce."

(d) Where upon the trial of such a case, an issue is raised by the defendant as to the volume of wholesale business done in commerce, and the plaintiff is proceeding to prove the volume of wholesale business, was it error for the trial court to limit the plaintiff's proof as to such volume of wholesale business on the ground that it was cumulative, and having done so, then apply the de minimis doctrine to defendant's wholesale business in commerce?

(e) May a trial court elicit from a defendant purely hearsay and opinionative testimony and accept such in preference to unquestioned documentary evidence and the testimony of three fair and unimpeached witnesses?

3. The Reasons Relied Upon For Allowance of The Writ of Certiorari.

It is respectfully submitted that this Honorable Court should take up this case and reverse the decision of the Courts below because:

(a) Petitioner respectfully submits that it is of utmost importance to the courts and to other wholesale industries at large that the main question presented should be settled by this Honorable Court, to-wit: May a wholesale merchant engage in unfair competition with other like industries by employing labor at sub-standard wages ($11.00 for 76 hours of labor) and thus avoid the letter and spirit of the Fair Labor Standards Act, simply by conducting a small retail business in the office of his wholesale business? If so, then all similar industries may with ease avoid the whole scheme and purpose of the Act, and may be justified if some are permitted to do so.

(b) This case presents a fair sample of the disregard with which this Act is treated by employers as regards certain unfortunate underprivileged persons, and for whose benefit the small minimum wage provisions of the Act were intended.

(c) The Circuit Court of Appeals in a very few words affirmed the judgment of the trial Court, without reference to any question or issue of law or fact relied upon by petitioner.

(d) The judgment of the trial Court, affirmed by the Circuit Court, is manifestly erroneous in that it rest upon the erroneous assumption that irrespective of the fact that petitioners were employed and worked exclusively in respondent's wholesale business they were not within the coverage of the Act because the defendant operates a "retail establishment" in the office of their wholesale business. Under the Act and the decisions of this Court

construing the same, it now appears to be settled law that it is the character of services rendered by the employee and not the business of the employer which determines the applicability of the Fair Labor Standards Act: Walling vs. Jacksonville Paper Co., 317 U.S. 564; 63 S.Ct. 332; Kirschbaum vs. Walling, 316 U.S. 517.

(e) The undisputed facts as to the character of work performed by these colored laborers as warehousemen and truck drivers, brings the case squarely within the rulings of this Honorable Court in the following cases, which the Circuit Court of Appeals did not refer to, and wherein it was held that the receipt of, and the loading and unloading of interstate shipments of goods into and from warehouses, is a part of interstate commerce: Walling vs. Jacksonville Paper Co. supra; Baltimore & Ohio R.R. vs. Brich, 263 U.S. 540, 544; Cleveland & St. L. Ry vs. Pet Milk 339 U.S. 538, 595; Federal Trade Commission vs. Pacific Paper Co. 273 U.S. 52; Brennan vs. Titusville, 153 U.S. 289; Mozier vs. Alabama, 218 U.S. 124.

(f) Because in such cases, even where "a substantial part" of an employee's work is devoted to transactions in interstate commerce, they come within the provisions of the Act, and the decisions of the courts below cannot be reconciled with: Walling vs. Goldblatt Bros. 123 F. (2) 778 (6); Walling vs. American Stores 133 F. (2) 840 843; Davis vs. Goodman, 133 F (2) 52.

(g) The volume of interstate shipments and business in a given case is not material in determining the applicability of the Act. In the case of U.S. vs. Darby, 312 U.S. 100, 122, a case — incidentally originating in the same District Court and brought by his Honor the present District Judge, then a practicing attorney — the Fair Labor Standards Act was attacked as being unconstitutional

upon several grounds. In construing the intention of the Congress this court held:

"Congress to attain its objective in the suppression of Nation wide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume, or the amount of shipments in commerce, or of production for commerce, by any particular shipper or producer, it recognized that in present day industry competition by a small number may affect the whole, and that the total effect of competition of any may be great".

(h) The decision of the trial Court as to the volume of defendant's wholesale business in commerce rests upon hearsay and the opinions of the employer, and disregards the positive documentary and other proofs submitted by petitioner.

(i) Petitioner was precluded from proving the volume of defendants wholesale business done in commerce by said ruling of the trial court holding that such evidence was "cumulative", and petitioner was thereby deprived of a fair and impartial trial, contrary to the Constitution and laws of the country.

9. Accompanying Documents

A certified copy of the transcript of the record of the proceedings had in the District Court and in the Circuit Court of Appeals is herewith presented.

WHEREFORE petitioner respectfully prays that a writ of certiorari issue under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the 5th Circuit directing said Court to certify and send up to this Court upon a day to be designated, for its review and determination, a full and complete transcript of all proceedings in said Circuit Court of Appeals in the case entitled George Harris, et al, Appellant, vs L.L. Hammond, operating and doing business as L.L. Hammond & Company,

ppellee, No. 10841; that the decision of said Circuit Court of Appeals rendered on the first day of November 1944, be reversed and that the judgment of said District Court be reversed, and that a judgment be rendered by this Honorable Court in accordance with the law and the facts; that petitioner may have such other and further relief as may appear to be just.

And your petitioner will ever pray, etc.

Dated Augusta, Georgia, January 27, 1945.

[illegible], Individually
and as Agent of Ellis Chaniel.

James Franwick Chance

and Reasevant Chance,
Attorney for Petitioner.

Post Office Address:
313-314 Marion Building
Augusta, Georgia

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

NO. _____

GEORGE HARRIS INDIVIDUALLY AND AS THE DESIGNATED AGENT IN EMPLOYMENT OF ELLIS LEDWELL,

PETITIONER,

VS.

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY,

RESPONDENT.

BRIEF OF PETITIONER

The opinion of the District Court is officially reported in Harris vs. Hammond, 61 F. Supp: 91. The decision of the Circuit Court of Appeals is officially reported in Harris vs. Hammond, 145 F. (2) 338 (R.36-38).

Jurisdiction Of This Court.

This is an action brought under the Fair Labor Standards Act of Congress (29 USCA Sec. 201, et seq.) to recover $9,722.16, and involves a construction of said Act.

POINT ONE

The Courts below have misconstrued and wrongly decided important provisions of the Fair Labor Standards Act, we respectfully submit.

The pertinent provisions of the section of the Act involved are as follows: Sec. 13 (a) (1) and (2): "The provisions of sections 6 and 7 shall not apply with respect to

(1) any employee employed in a bona fide . . . local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by the regulations of the administrator); or (2) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce."

The Statute clothes the administrator of the Act with authority to define and delimit the terms "local retailing capacity" and "capacity of outside salesman", contained in 13 (a) (1), apparently leaves it to the courts to define the meaning of the term "retail or service establishment" as used in 13 (a) (2) of the section.

"The term 'employee employed in a bona fide local retailing capacity' in section 13 (a) (1) of the Act, shall mean any employee (a) who customarily and regularly is engaged in making retail sales, the greater part of which are intrastate; performing work immediately incidental thereto, such as the wrapping or delivery of packages, and (b) whose hours of work, of the same nature as that performed by non-exempt employees, do not exceed 20% of the number of hours worked in the work-week by such non-exempt employees". W. H. Man, (1943) page 491.

The second provision of the section, that is 13 (a) (2), which exempts "any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce", appears to have been the subject of considerable inquiry by the courts, and in order to arrive at the intention of the Congress and give a true definition of the term "retail establishment" have examined into the history of the legislation and the discussions had by the framers of the Act. We quote as follows from Walling vs. American Stores (1943) 133 F. (2) 340,343, from the Third Circuit Court of Appeals:

"The meaning to be attributed to the term 'retail establishment' need not rest upon administrative interpretation alone. Consideration of the legislative history shows clearly, we think, what was in the mind of the Congress when this term was written into the Act. Section 13 (a) (2) was not contained in the original drafts of the Act. The only provision prior to the inclusion of 13 (a) (2) which dealt with retailing, was section 13 (a) (1), which excepted any employee employed 'in a local retailing capacity'. This failed to satisfy some of the members of the House who seriously doubted that it covered intrastate 'retailers' situated near state lines and making occasional interstate sales. What the congressmen meant by the use of the term 'retailer' is discernible from their questions and comments. Representative Lemaey prior to the adoption of the amendment, asked whether the Bill could not in any way affect such business as that of the local groceryman, druggist, clothing store, meat dealer, laundry, hospital, hotel or transportation company, operating solely within a State'. Representative Massingale offered an amendment and stated it was 'for the purpose of protecting what you would call the corner grocery store man or the filling station man'. The House voted down all amendments to achieve this purpose upon the insistence of Representative Norton, that the Bill amply covered the problem, until Representative Cellar offered his amendment. It excepted 'any retail industry, the greater part of whose sales is in intrastate commerce'. This he argued indicated 'in the clearest way that retailing is exempted'. If it were accepted 'then retail druggists, retail butchering, retail groceries, retail clothing stores and department stores, will all be exempt'. The amendment was accepted . . . The amendment as it finally emerged, exempted any 'retail establishment'. This we think limited the exemption to the type of re-

tailing business, -- the intrast to retail store, originally contemplated in the House discussion."

It would therefore appear that the activities of the defendant in the present case are foreign to the purpose and the objects of the exemption as here defined by the court.

POINT TWO

"In determining the coverage of the Act it is the character of the employment rather than the volume of business done which controls." Davis vs. Goodman, 133 F. (2), 52, 53 (4th Circuit Court of Appeals); Fleming vs. Hawkeye Button Co., 113 F. (2) 52; American Stores vs. Fleming, 138 F. (2) 840.

In the case of U.S. vs. Darby, 312 U.S. 100, 123, it was said: "Congress to attain its objective in the suppression of nation-wide competition in interstate commerce has made no distinction as to the volume or amount of shipments in the commerce, or production for commerce, by any particular shipper or producer. It recognized that in present day industry competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great."

POINT THREE

Upon the trial and while they were proceeding with their proofs in thecourt below to sustain their allegations that the defendant was engaged extensively in the wholesale business by witnesses who were actual customers of the defendant, and consisting of retail merchants, the court cut short the appellants' proofs as "cumulative". (R.30) Notwithstanding this, the court in its judgment has applied the maxim de minimis doctrine to defendant's wholesale business, and which finding is based purely on hearsay evidence which has no probative value.

Under the Federal Conformity Act, State Statutes

prescribing rules of evidence, and decisions of State Courts construing them, are followed by Federal Courts, sitting in the States where such rules obtain: 28 USCA, Sec. 724. In the case of Higgins vs. Trentham, 186 Ga., 264 (1), the Supreme Court of Georgia held: "Ordinarily hearsay testimony is not only not admissible, but wholly without probative value, and its introduction without objection does not give it any weight or force whatever in establishing a fact." Citing Eastick vs. Com. Ass'y., 116 Ga., 48; Berry vs. Brunson, 166 Ga., 523, 532.

POINT FOUR

It is respectfully contended that His Honor the District Judge erred in that (a) he raised as an issue in the case the exemption contained in Sec. 13 (a) (2), i.e., that appellants were employed in a "retail establishment", when the defendant himself did not raise such issue by pleadings, and (b) that His Honor misconstrued and misinterpreted the applicability of Sections 6 and 7 of the Act, when he says: "If the defendant is a wholesaler, are these employees covered by the Act in all of their activities; were they wholly 'in commerce', and entitled to invoke the Act for all of the services they rendered, or only where the services had some immediate relationship to interstate commerce."

POINT FIVE

While it is admitted by the pleadings and the proofs that appellants, as truck drivers and warehousemen, devoted practically their entire time to transactions in interstate commerce in connection with defendant's wholesale shipments and sales, His Honor the District Judge held that appellants did not come within the provisions of 6 and 7 of the Act either as to straight time or over time. As pointed out, the allega-

tions of the appellants as to what their duties consisted of under their employment (record page 5) is not denied by the defendant, and under Rule 7 (d) and Rule 15, these allegations are admitted by the defendant. The appellants' testimony as to what their duties were and what they did is clear and unequivocal and is corroborated by all of the evidence in the case.

Apparently recognizing this situation, His Honor the District Judge concludes his opinion as follows: "But there are other aspects of the case which for the future guidance of the parties, properly may be discussed briefly. One of these relates to the over time compensation claimed by the truck driver and his helper while engaged in hauling goods from the railroads to the defendant's warehouse. While so engaged for a substantial portion of the time, if it had been a wholesaler they would have been engaged in interstate commerce and within the coverage of the minimum wage provisions of the Act, but without overtime provision."

What is meant by the "future guidance of the parties" as above suggested by the Court, we do not know, unless it was to warn the defendant that he should in the future comply with the law as to his warehouse employees and truck drivers. It now appears to be the settled law that where a defendant is engaged in the wholesale business — as is admittedly the case here — and has employees whose duties it is to work a substantial part of their time in connection with defendant's wholesale transactions in interstate commerce, such employees are covered by the Act: Walling vs. Goldblatt Bros., 128 F. (2), 778, (6); Walling vs. American Stores, 133 F. (2) 840, 843; Davis vs. Goodman, supra, 133 F. (2) 52. In the latter case it was said: "It is the character rather than the size of the activity which controls in determining whether an employer is engaged in commerce . . .The Fair Labor Standards Act may be

applied to a separate department of an employer's business, although another part is exempt from the Act."

The appellants were not only regularly engaged in receiving from interstate carries shipments of goods which they loaded and hauled into defendant's warehouse, but one day a week and sometimes two days a week they transported by truck interstate shipments of goods that had been sold by defendant's road salesmen to retail merchants in South Carolina. (R.16).

"The unloading activities carried on by employees at warehouses constitute part of the substantial incoming interstate movement of goods and such employees are therefore engaged in commerce within the meaning of the Act." Baltimore [illegible] vs. Burton, 283, U.S. 340, 344; Walling vs. Jacksonville Paper Co., 63 S. Ct. 332; 317 U.S. 564.

"It is too plain to require discussion that the loading or unloading of an interstate shipment is so closely related to interstate transportation as to be practically a part of it. The actual receipt of interstate shipments constitutes interstate commerce." Cleveland & St. L. Ry. vs. Bettlebach, 430 U.S. 568; Sou. Ry. vs. Prescott 240 U.S. 632.

POINT SIX

It appears from the evidence that the appellants during the period of their employment worked 76 hours weekly, and at a wage of approximately 14¢ an hour straight time. The defendant has thus been engaged in employing labor and paying sub-standard wages, and has thus been enabled to engage in unfair competition with other wholesale grocers in Augusta that have been paying standard wages to their employees. This is one of the expressed evils which the Act was intended to correct, and which is named in the preamble or "declaration of the policy"

of the Act; Sec. 2 (a) (4).

And what appears to be clear and unmistakable proof that the defendant's purpose and intention was to evade the law by deceitful means, is his testimony at the trial when he swore that he had not procured any business licenses to operate a wholesale business, and then when confronted with a certified photostatic copy of his sworn applications for such wholesale license, and two of the licenses issued to him, he had to admit that he was operating under a wholesaler's license.(R.24, 33 and 34).

Construing the provision of the Act, this Court in Fleming vs. Jacksonville Paper Co., supra, and again in Kirschbaum vs. Walling, 16 U.S. 517, held that it was the character of services rendered by the employee and not the business of the employer which determined the applicability of the section.

[illegible]

In conclusion we would respectfuly impress upon the Court these unquestioned facts: The defendant was licensed to do a wholesale business only. He made solemn oath that he did a wholesale business only, in order to get his business license. He at all time and in all instances advertised himself as a wholesaler only. He purchased all goods from brokers representing foreign manufacturers and producers and in car load lots, and never from a local wholesale merchant like retail grocers do. He maintained a very large warehouse, with only an office space in front. He employed road salesmen, and regular warehouse employees and truck drivers to haul in his car lot shipments and to make deliveries to some 153 retail merchants in Georgia and South Carolina, regular customers of the defendant during the period of appellants employment. The

character of services rendered by appellants is not in dispute by pleadings nor proofs.

Respectfuly submitted,

_____

ATTORNEY FOR PETITIONER

Post Office Address:
Augusta, Georgia

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO._____

GEORGE HARRIS, INDIVIDUALLY AND AS THE
DESIGNATED AGENT IN WRITING OF ELLIS MCDANIEL

PETITIONER

VERSUS

L.C. HAMMOND, OPERATING AND DOING BUSINESS AS
L.C. HAMMOND AND COMPANY.

RESPONDENT.

And now comes George Harris, petitioner herein for certiorari, and submits this his motion to this Honorable Court and respectfully shows :

-1-

That movant has filed in this Honorable Court a petition for a writ of certiorari in the above entitled case, and in which case Ellis McDaniel is, and became a party thereto in the Court below by designating movant in writing his agent, as authorized by the provisions of the Fair Labor Standards Act of Congress (29 USCA Sec. 201, et, seq.)

-2-

That the said Ellis McDaniel is now a private in the military service of the United States stationed overseas in the combat zone and is not accessible for the purpose of becoming a party in person to this motion.

-3-

That as appears from an affidavit hereto attached and made a part hereof, movant and said McDaniel are poor laborers without estate or funds with which to pay the costs incident to printing the records, briefs and other costs.

That movant has filed in this Honorable Court in the above stated case, ten clearly typewritten copies of his petition for certiorari and ten copies of the transcript of the record of all proceedings had in the Courts below, one of which copies is duly certified under the hand and seal of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

WHEREFORE movant prays an order allowing his said petitition and case to be filed and proceed on the typewritten record in the case, and for such other relief as may appear to be proper and just in the premises.

This the 27th. day of January, 1945.

George Harris

By Edward Reinhardt Cass

His attorney at law.

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE HARRIS, ET. AL.
PETITIONER

VS.

L.C. HAMMOND, OPERATING AND DOING BUSINESS AS L.C.HAMMOND AND COMPANY,
RESPONDENT.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

In person appeared before me the undersigned officer duly authorized by law to administer oaths, the subscriber hereto George Harris, who being first duly sworn deposes and says that he is the petitioner in the above entitled case, and is the duly authorized and designated agent in writing of Ellis-McDaniel for whose benefit this action was also brought pursuant to the provisions of the Fair Labor Standards Act of Congress.

Deponent further says that the said Ellis McDaniel is now a member of the military service of the United States and is stationed overseas in the combat zone and at a point and address unknown to deponent, and for that reason he is inaccessible for the purpose of making an affidavit in his own behalf.

Deponent further says that he is advised by his counsel and verily believes that he has good cause for appeal by his petition for a writ of certiorari to the Supreme Court of the United States to review a judgment against him rendered by the United States Circuit Court Of Appeals for the Fifth Circuit, but that owing to his poverty he is unable to pay the costs in said case or give security therefor; that deponents co-worker the said Ellis McDaniel is a private in the military service and owing to his poverty he is without and estate or funds with which to pay said costs or give security therefor; that deponent makes this

affidavit in order that he may have the said judgment of the Circuit Court Of Appeals reviewed by this Honorable Court without the payment of said fees and costs or giving security therefore.

That the natures of said cause of action, is a suit brought by petitioner as aforesaid to recover the minimum wages due to petitioner and the said Ellis McDaniel by their employer L.C. Hammond & Company under the Fair Labor Standards - Act of Congress, as petitioner is informed and verily believes.

George Harris

Sworn to and Subscribed before
me this the 26 th. day of January, 1945.

Florine Posser
Notary Public Richmond County
Georgia.

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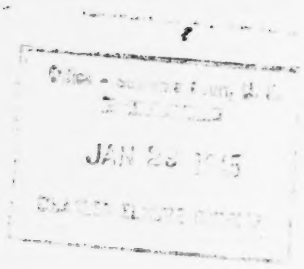

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1944.

NO. 881

GEORGE HARRIS, ET AL.,

Petitioners,

versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY,

Respondent.

---

ion for Writ of Certiorari to the United States
cuit Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA,
UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A.D. 1944, at Atlanta, Georgia, before the Honorable Samuel H. Sibley, the Honorable Joseph C. Hutcheson, Jr., and the Honorable Leon McCord, Circuit Judges:

GEORGE HARRIS, ET AL.,
Appellants,

versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY,
Appellee.

BE IT REMEMBERED, That heretofore, to-wit, on the 1st day of November, A.D. 1943, a transcript of the record in the above styled cause, pursuant to an appeal from the District Court of the United States for the Southern District of Georgia, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 10841, as follows, to-wit:-

IN FORMA PAUPERIS

TRANSCRIPT OF RECORD,

* *

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS, FIFTH CIRCUIT.

NO. 10841

GEORGE HARRIS, ET AL.,

Appellants,

versus

L. C. HAMMOND, Operating and doing business as
L. C. HAMMOND & COMPANY,

Appellee,

- — - - - - - -

Appeal from the District Court of the United States for the
Southern District of Georgia.

- - - - - -

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UNITED STATES CIRCUIT COURT OF APPEALS,

FIFTH CIRCUIT.

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CAPTION

GEORGE HARRIS, INDIVIDUALLY AND AS THE DESIGNATED AGENT OF ELLIS McDANIEL,

PLAINTIFFS,

VS.

L. C. HAMMOND, OPERATING AND DOING VUSINESS AS L. C. HAMMOND & COMPANY,

DEFENDANT.

CIVIL ACTION NUMBER 176

IN THE DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

- - - -

GEORGE HARRIS, INDIVIDUALLY AND AS THE DESIGNATED AGENT OF ELLIS McDANIEL, PLAINTIFFS, VS. L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY, DEFENDANT,	ACTION TO RECOVER WAGES AND LIQUIDATED DAMAGES UNDER FAIR LABOR STANDARDS ACT OF CONGRESS.

George Harris, individually and in his representative capacity as the duly appointed and designated agent of Ellis McDaniel, as plaintiffs, bring this action against L.C. Hammond, operating and doing business under the same and style of L.C.Hammond & Company, as defendant, and respectfully shows to the Court,

-1-

That the defendant is engaged in buying and selling groceries, goods, wares and merchandise in wholesale quantities, and has his principal office and place of business within said district and division thereof.

-2-

That plaintiffs at all times herein mentioned were employees in the employ of the defendant as laborers, in the operation and conduct of said wholesale business.

-3-

That this action is brought under and pursuant to the provisions of an Act of Congress known as the Fair Labor Standards Act of 1938.

-4-

That plaintiff George Harris is the duly appointed and designated agent in writing of said Ellis McDaniel, within the meaning of said Act, a true copy of such designation and appointment being hereto attached as Exhibit "A" and by such reference made a part hereof.

-5-

That in the operation and conduct of said business the defendant was at all times herein mentioned subject to and bound by the provisions of said Act of Congress, but has willfully failed and refused to comply with the law, and the wages and hours provisions thereof, by paying to plaintiffs the minimum scale of wages therein specified.

-6-

Plaintiffs attach hereto an itemized statement showing the respective time and overtime made by plaintiffs since the effective date of said Act, and showing the minimum wages due therefor, the wages paid by the defendant, and liquidated damages as provided for under said Act of Congress, the same being designated as Exhibit "B" and by such designation the same is made a part hereof.

-7-

That as appears from said itemized statement the defendant is justly and truly indebted to the plaintiffs in the sum of $9,722.16.

-8-

That under said Act of Congress plaintiffs are also entitled to recover and hereby claims all expenses of this litigation, including reasonable counsel fees.

WHEREFORE plaintiffs demand judgment for said sums, and that due process of this court may issue requiring the defendant to

be and appear in answer to this complaint, as provided for under the rules of the court.

Paul T. Chance
Attorney for Plaintiffs.

EXHIBIT "A"

STATE OF GEORGIA,
RICHMOND COUNTY.

I, the undersigned employee; of L.C.Hammond & Company do hereby designate and appoint George Harris as my agent, to act for me under the Fair Labor Standards Act, in collecting any wages due me under said Act, and that he may employ the services of counsel to assist him, and I covenant and agree that no one will be permitted by me to interfere with my said agent, and that I will report to him every statement made to me by any one concerning this matter. This agreement and agency is coupled with an interest, and the same is irrevocable for any cause.

This is a voluntary agreement and designation on my part, and I fully understand the same.

Ellis McDaniel

(EXHIBIT "B" omitted as being immaterial.)

U.S. District Court, Augusta Division. Filed in office this August , 1942 at 12:40 P.M. Scott A.Edwards, Clerk, By Orlena T.Weaver, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

GEORGE HARRIS, INDIVIDUALLY AND AS THE DESIGNATED AGENT OF ELLIS McDANIEL, PLAINTIFFS, VS. L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L.C.HAMMOND & COMPANY, DEFENDANT.	ACTION TO RECOVER WAGES AND LIQUIDATED DAMAGES UNDER FAIR LABOR STANDARDS ACT OF CONGRESS.

And now come the plaintiffs in the above stated case, and amend their petition of file herein as follows:

-1-

By adding to and at the conclusion of paragraph 5 of their said petition the following allegations as paragraph 5-a, to-wit:

-5-a-

That in the operation of his said business the defendant purchases in States other than Georgia and in wholesale quantities, goods, wares and merchandise, which are transported to the defendant's said place of business by common carriers,and at all times herein mentioned it was and became the duty of plaintiffs to receive and assist in unloading the said goods,wares and merchandise from said common carriers and convey the same into the warehouse of the defendant; that the defendant sells to customers in States other than Georgia large quantities and in wholesale lots,goods,wares and merchandise,and it was and became the duty of plaintiffs to assist in loading,checking and delivering said goods,wares and merchandise from the defendant's warehouse and store to common carriers,to be shipped in interstate commerce.

WHEREFORE plaintiffs pray that this their amendment be allowed by the court.

Paul T.Chance

ATTORNEY FOR PLAINTIFFS.

Due and legal service of the foregoing amendment is hereby acknowledged. Copy and all other and further service and notice are hereby waived.

This the 3rd day of September, 1942.

Curry & Curry

ATTORNEYS FOR DEFENDANT.

****

The foregoing amendment is hereby allowed and ordered filed as a part of the record in said case.

This the 6th day of September 1942.

Archibald B. Lovett,

UNITED STATES DISTRICT JUDGE.

U.S.District Court,Augusta Division. Filed in office Sept.4,1942. Scott A.Edwards, Clerk, by Orlena T.Weaver, Deputy Clerk.

NO. 176

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION.

GEORGE HARRIS, INDIVIDUALLY AND AS THE DESIGNATED AGENT OF ELLIS McDANIEL,
PLAINTIFF

VS.

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L.C.HAMMOND COMPANY,
DEFENDANT.

ACTION TO RECOVER WAGES AND LIQUIDATED DAMAGES UNDER FAIR LABOR STANDARDS ACT OF CONGRESS.

ANSWER

Now comes the defendant in the above stated case, and in answer to the complaint, says:

1. Defendant denies the allegations of paragraphs one of the complaint.

For further answer to the allegations of this paragraph, defendant says that he does buy practically all of his groceries, goods, wares and merchandise in wholesale quantities, but he denies that he is engaged in selling said groceries, goods, wares and merchandise in wholesale quantities and says that less than 25% of his business is the selling of groceries, goods, wares and merchandise in wholesale quantities.

For further answer defendant admits that his principal office and place of business is within said district and division.

2. In answer to the allegations of paragraph Two, this defendant admits that George Harris and Ellis McDaniel were employees in his employ during the period mentioned in the complaint, but defendant denies that they were at all the times mentioned therein in his employ.

3. The allegations of paragraph Three of the complaint consist entirely of conclusions of law on the part of the pleader and require no factual answer. Further answering the conclusions of said paragraph, however, this defendant says that he is not engaged in any bus-

iness contemplated by the Fair Labor Standards Act of June 25, 1938, referred to in the third paragraph of plaintiff's petition and that said Act has no application to the employment of the present plaintiff or the party for whom he is acting as agent or the services rendered by them during the times mentioned, either as to their hours of labor or rates of pay.

4. For want of sufficient information, this defendant can neither admit nor deny the allegations of paragraph Four of the complaint but demands strict proof of same.

5. Defendant denies the allegations of paragraph Five, For further answer to the allegations of said paragraph Five, this defendant says that he is primarily engaged in a retail establishment and that plaintiff and the party for whom he is acting as Agent were, during their entire employment by defendant, employed in a bona fide local retailing capacity and were not engaged or employed in commerce or in the production of goods for commerce in contemplation of said Fair Labor Standards Acts, which said Act has no application and had no application to the employment of plaintiff and the party for whom he is acting as agent, either as to their hours of labor or rates of pay.

6. Defendant denies so much of the allegations of paragraph Six of the complaint that may be construed to mean that the itemized statement referred to therein as Exhibit "B" is a correct statement of the time and overtime made by plaintiff and the party for whom he is acting as Agent, since the effective date of the Fair Labor Standards Act of 1938.

7. Defendant denies the allegations of paragraph Seven of the complaint and particularly denies that he is indebted to plaintiff or the party for whom he is acting as Agent, in any amount, whatsoever.

8. Defendant denies the allegations of paragraph Eight of the complaint, and particularly denies that he is indebted to plaintiff

or the party for whom he is acting as Agent, in any amount for expenses of this litigation or for reasonable counsel fees as alleged in the complaint.

9. For further answer, this defendant says that he is not engaged in commerce or the production for goods in Commerce as contemplated in the Fair Labor Standards Act of 1938 and the amendments thereto.

10. For further answer, this defendant says that the work performed by plaintiff and the party for whom he is acting as Agent, and now complained of, was performed in defendant's retail establishment, the greater part of whose selling is in intrastate commerce, and the services rendered were in a local retailing capacity and were not the character of services contemplated and provided by the Fair Labor Standards Act.

WHEREFORE, having fully answered, defendant prays to be discharged.

CURRY & CURRY

ATTORNEYS FOR DEFENDANT

U. S. District Court, Augusta Division. Filed in office this Sept.1, 1942. Scott A.Edwards,Clerk, by Orlena T.Weaver, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION.

- - - - - - -

GEORGE HARRIS, INDIVIDUALLY, ETC.	CIVIL ACTION
V.	NO. 176.
L.C.HAMMOND, OPERATING AS L. C. HAMMOND & COMPANY.	

- - - - -

BRIEF OF EVIDENCE

J. H. McKie being duly sworn as a witness for the plaintiff testified as follows:

I was in the employ of L.C. Hammond & Company from October 23, 1938 to December 28, 1939, it was my duty to spend the entire day on Monday on the road in South Carolina as a salesman and collector. I collected for the merchandise I sold the previous week. Those sales were to retail merchants. This list of retail merchants you hand me were active customers of L. C. Hammond & Company in South Carolina and Georgia, they bought merchandise practically every week. This list of 153 retail merchants varied from time to time, sometimes they did not buy every week. I do not mean that I visited 153 merchants on one day. Some of them I would call on one every two or three weeks, I could not possibly call on that many in one day. Some of them purchased merchandise direct and not through me, they would come in during the week. I could not say how much time I devoted to sales and how much to collections. L. C. Hammond & Company were wholesale merchants during the time of my employment. They also made some retail sales every day in the week, they were always bigger on Saturday, that is sales were made particularly to farmers living in South Carolina, Mr. Hammond's home State where some of his relatives are.

As to the amount of retail sales to these farmers I would not think it would run over 25%. As to the amount of retail business done for the South Carolina farmers, it would be about 10% of his total business, I mean to say that 10% of it could have been retail in South Carolina. I would say that 90% was wholesale and 10% retail.

"The Court: May I ask, how do you know that? A.I could not say exactly - The Court: Let me understand you. Did you have access to their books and records; Why are you saying that; do you really knew whether they sold $100.00 worth a month? A. No, sir; I know what I sold. The Court: And they what was sold through others in Georgia and elsewhere you had nothing to do with? A. No,sir. The Court: I confess, Mr. Chance, you are not making a very impressive witness of him, about sales; he does not seem to know anything about it except what he did himself; I do not see at this time how this evidence will benefit me much - Go ahead."

I would not know enough to give you a correct figure, and I have given you my estimate, this retail business was mostly to farmers in South Carolina. It was a kinder supply business to customers - a barrel of flour, side of meat or tub of lard. Some of it would be individually and some for their hands. As to Georgia retail business L. C.Hammond & Company did very little. I was there five days in the week and I knew just about who was selling and to whom as he did, and their retail business was very little,I would say it might run 5% in Georgia.

They had a warehouse in Augusta,but they did not have one anywhere else. They had letter heads and stationery on which they called themselves wholesalers, and they had that on their stationery and on their signs. Their store faces on Broad Street and it goes all the way through to Jones Street, in the rear of this place is the warehouse. As well as I remember the sign read

"L.C.Hammond & Company, Wholesale Groceries & Feed". I don't think I ever saw the name of L.C.Hammond & Company on anything that did not have "Wholesale Groceries" on it. I never saw any sign or stationary with the word "Retail" on it.

There were about eight or ten merchandise brokers in Augusta that sold him in carload lots, besides general merchandise they sold a line of paint, hardware, nails, wire, lime and cement and the like, and he bought feed in carload lots and flour. I have known him to buy more than one carload at a time. The stuff that I sold came in mostly by railroad from other states; as to what part I took in interstate shipments I went with the truck to get it. I unloaded flour and feeds and anything that came in by rail or truck and placed it in the warehouse, and packed it or stacked it. I was shipping the produce or driving the truck, moving the freight, I received the stuff, unloaded the trucks, and loaded the trucks and hauled it out. I shipped and received by truck and acted as truck driver in handling the stuff. Some of that was from without the State and some in the State, and some of that would be in quantities more than carload lots and some less, and some would be by railroad and some by trucks. I don't know of any shipments that came from within the State, they were all mostly from Maryland and Virginia up there, and the flour mostly came from up there.

During the period from October 24, 1938 until December 1939 I worked for 12 hours a day for five days in the week, and worked 15 hours on Saturdays. I worked 75 hours a week during the period of my employment. During the period of my employment from October 28, 1938 to December 24, 1939 they paid me $20.00 per week. This statement attached to my petition reflects a fair statement of the hours worked and the overtime and the amount of money I re-

ceived and the amount of money due me.

CROSS EXAMINATION BY DEFENDANT

I went to work there on April 6, 1936. As well as I remember this list of customers introduced in evidence includes all of the retail people who have purchased goods from Hammond & Company during this entire period. There are a great many of these people listed here who in October 1938 had entirely ceased to do business with Hammond & Company. The sign of L. C. Hammond & Company, Wholesale Groceries, is on the front and one on the side windows at 1283 Broad Street. That is the main business street in Augusta. There are show windows on either side of it, the store has counters and shelves in it and a cash register, and they have regular cash tickets for the various customers. As each customer makes his purchase it is rung up; that is done every day. I would not know that on Saturdays there are five or six hundred retail customers in the store. They could not wait on that many. I don't know, I could not estimate it. I waited on the retail trade except on Saturdays. In going to South Carolina on the same day I worked some Georgia customers between here and the various places. They were all in Aiken County and McCormick and Edgefield County across the river, mostly. I had some over here between here and Fury's Ferry, but during the time I worked there those were the only ones I sold. I had customers in Georgia and South Carolina. I don't know any others I sold to except these in the three Counties in South Carolina.

When I went to work for Hammond & Company they did not employ me as a salesman, I succeeded him. He was doing that then and he was taken sick and I went on the road. He finally turned it over

to me and every Monday I had to go to South Carolina to solicit orders, and I did that as long as I was there. As to Hammond & Company purchasing goods from Wholesale people in Augusta, he used to swap about some. He probably did a little bit of purchasing in Augusta, I don't know whether he ever purchased any goods from Chandler & Company in Augusta or from other wholesale people. I think he get all of his stuff by railroad and by truck from other places. The deliveries of goods were by truck, he did not ship anything there by rail, but altogether by truck.

As to this warehouse I have been talking about, that is at the store on Broad Street. Mr. Hammond has no other warehouse. Just in the front part of the store there are a few shelves and a place for display and back of that is the warehouse. The only retail business they conduct is in this spot, they sell goods off the shelves there like the A. & P. and Rogers and anybody that wants to can go there and buy groceries, sardines and other groceries and buy them at retail. I worked in the retail part some days and some days in the warehouse, but most of my time was in the warehouse, because I was loading and unloading trucks in and out, but I worked some each day in the retail department. I worked the greater part in the warehouse each day, considerably more I think.

George Harris, a witness for the plaintiff, being duly sworn testified as follows:

I was employed by L. C. Hammond & Company from October 23,1938 to June 15, 1941. As such employee my duties were truck driver. I drove the truck to South Carolina, delivering and hauling freight in and out. This delivering and hauling took up practically all

of my time, that was my job. This list you hand me is a correct list of retain grocers who purchased goods from Hammond & Company while I was in their employ. I have gone over that list. Mr. McKie and I made up this list, those retail grocery merchants were active customers of Hammond & Company while I was employed there. I delivered the goods to them. I delivered it in their truck. The goods that came to Hammond & Company's store came by carloads and truck loads, and we hauled them in and out, I mean railroad cars. I drove the truck and I had a helper, a warehouseman. I would go to the railroads and get the shipments of merchandise that came in. Most of my time was spent in hauling bulk stuff and arranging the stock, cleaning up and restacking the stuff. Ellis McDaniel would help me.

There is a sign over the door "Hammond & Company, Wholesale Groceries". There has never been any other sign there while I was in their employ. I have handled bills and bill heads and letter heads of L.C.Hammond & Company, and I have never handled any except the ones that had the words "Wholesale Groceries" on them. I have never seen anything else on any of them. The flour they bought would come by carlots from brokers. Five or six or seven brokers would come there and sell goods, and they would buy flour, nails and cement and such, and various goods in carload shipments. That would come into Georgia from other States, and I would unload them from the railroad and put them in the warehouse. L.C.Hammond & Company did very little retail business, it was mostly on Saturdays and the people principally sold to were from South Carolina, they were mostly farmers. Mr. Hammond came from South Carolina. I worked there eight years and during that period of time I was in position to know very well where their retail business came from and the major-

ity of it came from farmers in South Carolina. Some time they would buy three barels of flour at a time. You couldn't much tell who it was for, but some few would buy for themselves.

I have gone over carefully the statement attached to my petition and it is a true reflection of the time and overtime service while I was in their employ and the amount due me. While I worked there they paid me $11.00 a week. During the time I worked for L.C. Hammond & Company I went to work at 7 o'clock in the morning, and would get off at 7 o'clock in the evening for five days a week, and on Saturday I would go to work at 7 o'clock in the morning and would get off at 11 o'clock in the evening, and that was during the entire time I was employed by L.C.Hammond & Company.

CROSS EXAMINATION BY DEFENDANT

I went to South Carolina two days each week. I went every Wednesday and sometimes on Thursday. I went once on Thursday. This list you have here are all of the people that had purchased merchandise from Mr. McKie during the entire period he worked there, retail merchants, from 1938 to 1941. Those I hauled to regularly, every one on this list were retail customers in 1938. All the goods I carried to South Carolina were carried on truck. That is the way I delivered the goods.

Ellis McDaniel, a witness for the plaintiff, being duly sworn, testified as follows:

I was in the employ of L.C.Hammond & Company from October 23, 1938 until August 1, 1942. During that time I was a warehouseman. The merchandise bought by Hammond & Company came into Augusta in trains and car boxes. George Harris and I would haul that stuff from the railroads to the warehouse, we went to the car boxes and

loaded it to the store and stacked it in the store. This list you hand me is a correct list of retail grocery merchants and customers of L. C. Hammond & Company while I was employed there. They were active customers of L. C. Hammond & Company while I was there. The goods that were sold to these retail customers by Hammond & Company were delivered in Hammond & Company's truck, I helped to load the truck and deliver the goods. My duties in hauling goods into the warehouse and delivering goods to customers of L.C. Hammond & Company took up all of my time. These shipments that came in were shipments from other States. L. C. Hammond & Company were conducting at the time a wholesale grocery and feed store. They had a sign that read that way over the front door. There has never been any other kind of sign over the door. I have never seen any letterheads or bill heads with anything on them except "Wholesale Groceries". They bought these groceries from brokers, eight or ten of them; they sold them regularly and in carload lots. They would buy flour and groceries, and feeds and salt in carload lots. They also handled hardware and building cement and things like that. While I was in their employ they did very little retail business, they did the most of it on Saturday, and that business came from South Carolina. Most of the retail customers are farmers over there. They would buy stuff mostly for a period of a month at a time, for themselves and their hands that are working on their places. I would say that the average sales made to them would be fifteen or twenty dollars a month. The larger ones would be around twenty-five to fifty dollars a month.

This statement attached to my petition reflects hours of overtime I worked while in the employ of L. C. Hammond & Company, and the amount of money I received and the balance due me. I went to work at 7 o'clock in the morning and would get off at 7 o'clock in the evening for five days, and on Saturday I would go to work at

7 o'clock in the morning and get off at 11 o'clock at night, that was from October 23, 1938 to August 1, 1942. From October 23, 1938 to April 15, 1941 they paid me $11.00 a week; from April 15, 1941 to March 25, 1942 they paid me $15.00 a week; and from March 25, 1942 to August 1, 1942 I got $20.00 a week.

CROSS EXAMINATION BY DEFENDANT

I say they have a sign outside there with the words "Wholesale Groceries". They did when I was there. It was on the door, and on the trucks and on the bills of lading. It was when I left there, and on the side of the truck and also on the billheads.

B. L. Harbeson, a witness for the plaintiff, being duly sworn testified as follows:

I am in the grocery business and I know L. C. Hammond. I buy a lot from him. I came here under subpoena, not voluntarily. I have been buying groceries from him for the past five or six years. Mr. Hammond and myself have some shipments at times that come together, the amount I buy as an individual is very small, we sometimes get a carlot together. I am in the retail business, not in the wholesale business. I may buy every week or so. Sometimes it would be a month I wouldn't buy anyghing. On the average I would buy every week or two.

CROSS EXAMINATION BY DEFENDANT

I know where Mr. Hammond's place of business is. My place of business is just three doors from his. He sells retail also. He has shelves there and a warehouse. In the back office is a partition and he has heavy stuff back there. He sells heavy stuff retail, I see customers there every day. Mr. Hammond conducts a retail business like me.

RE-DIRECT EXAMINATION BY PLAINTIFF

I am not personally acquainted with his customers. I would not know when a retail or a wholesale customer would come in his place, if he did have 160 or 170 customers in there they could be in there buying and I wouldn't know whether they were in there buying wholesale or retail.

BY THE COURT: "Are these witnesses, Mr. Chance, for the purpose of establishing the character of business as wholesale or retail?" Mr. Chance: "To show that they were primarily purchasing goods from Hammond as a wholesale merchant in volume." By the Court: "I will limit you to three witnesses. It is cumulative testimony."

L. M. Lively, a witness sworn for the plaintiff testified as follows:

I am in the grocery business in Augusta, me and my wife. I look after the business and I know Mr. L. C. Hammond. I have been doing business with him four or five years. As to Mr. Hammond being engaged in the wholesale grocery business, that is what I understand. As a retail merchant in the grocery business I buy groceries from him, I buy every week, sometimes two or three times and sometimes every day. I am a regular customer of his.

CROSS EXAMINATION BY DEFENDANT

I do not know what my accounts run up to each week. I do not have any charge account. I go and get what I need and pay for it. I get in small quantities. It would be less than $100.00 a week - just as I need it.

L. C. Hammond, the defendant, being sworn, testified in his own behalf as follows:

I am the owner of L.C. Hammond & Company, located on Broad Street in Augusta. We have a grocery business and office. The majority of our business is feeds; we distribute, sell most of it to dairymen and poultrymen, weekly trade, and then we do quite a bit of that kind of retail business right at the front door. Yes, sir, I have display windows. I do not advertise wholesale on my windows, I never have. The picture you hand me I remember was made in the year 1938. I recall the instance and know that is the date. Those are correct pictures of my windows in 1938. Those are the same signs now that were there then and those are the two boys that work for us, the ones that testified here. I had my goods displayed just that way and have ever since. I do some wholesale business, a small mount, solicit one day out of a week. I do not run a whoesale grocery store, never have. Only use that one day in the week to help with the buying. They just buy in little larger quantities and we furnish them; no wholesale business. The merchandise I sell I usually get some out of Florida and some in Georgia and from different points. As to carload shipments we might get a car of flour about every three months. Two or three would go in together and buy a carload of feed. Harbeson and Hall. It was right out of Macon, Juliet Milling Company, buy a car together. I get my canned goods at no special place. We get a lot in Georgia and some in Maryland, practically all feed since the summer of 1938, back door in trucks.

I bought from Southern Grocery Company here wholesale, and tobacco from Chandler Company. We bought lime and cement from Satcher Company. We did not get that by railroad. As to truck

load deliveries brought in by truck from other states, I do not know, I reckon there were some from other trucks, but they, of course, furnish the men to unload them. That might be peas or beans or a few cases of tomatoes or peanut butter.

I have counters and shelves in my store and a cash register, and I ring up the cash sales. On the run of a day through the week I would say they would average 150. I would say 500 on Saturdays. These boys waited on the retail trade. That is what they were there for to tote the stuff out to buggies and wagons. On Saturdays practically all their time was given to that. That is what we have them for. One day in the week they are engaged in what you might call interstate commerce. Wednesday they deliver goods, on Wednesday they would deliver goods to not over 30 customers, probably less. He could not handle 50 or 75 or more in the day, it would be impossible. On these Wednesdays they would be back nearly always around 3:30 or 4 o'clock. They would leave around 10 o'clock. I do not have over 35 wholesale customers on my books located in South Carolina with the ones we sell in small quantities I have no warehouse. Just a store that fronts right on Broad Street, it is probably 140 or 150 feet deep. That is all the place of business I have and all the merchandise I have is in that place. I serve all the retail trade in that place, it is about 30 or 40 feet wide, one story. It is occupied by a residence overhead and I occupy only one floor. I have only one truck.

CROSS EXAMINATION BY PLAINTIFF

I came from South Carolina and I have relatives over there. As to who made these pictures, a feed salesman. I do not know where he is now. He was with the Quaker Oats people. I have been in the business I am in since 1931, and I am still in that business. I am not at the same place. I have moved. I am operating by myself.

My store and storage room do not run all the way from Broad Street through to Jones Street. There is a vacant lot in the back but no building between my store and Jones Street. As to the cash registers and counters I spoke of and how much space they took up, I would say 35 or 40 feet, the balance of it is for storage warehouse and feed. As to there being a partition between the two, indicating where the warehouse department is built inot it, it was already there, I don't know what it was there for. There is no door there at all. I guess a door could be put there. As to the retail business I spoke of I didn't say the most was done on Saturday, I did not say that. Of course, weprobably do more on Saturday, but is 5 minutes in the day that there is not a sack of feed going out.

The great majority of the sales I refer to as retail customers and friends are not from South Carolina. Of course, some of them were from South Carolina and some from Georgia, that is all our business area. We will sell one from South Carolina as quick as we will sell one from Georgia. I don't ever know where they come from.

Q. You testified that several hundred customers would come in daily and 500 on Saturday? A. Yes, sir; that is correct according to the registers.

Q. Name some of your retail customers in Georgia. A. E.E. Hobby, buys four or five bags when he come in; Joe Fair at Haphzibah; I could name two or three hundred I expect if I took the time to check them.

Q. These men operate dairies? A. Some of them do.

Q. You sell them in quantities? A. One or two or three bags a day generally - lots of them buy one bag a day.

Q. Can you name any others? A. Rhodes Brothers; Willis Rhodes; yes, they are farmers; I would say they buy three or four or five dollars within a week; I don't know what he does with it.

Q. Name some others: A. John McKinney here. I could not name the ones that buy wholesale; I would not know what all of them do with it.

Q. And dealing with them every day and every week you can not name but four or five? A. I have not been very active there; I have been sick, and I am just in and out.

Q. That is all off hand you can name? A. Well, Reuben Jones; I reckon I could name more.

Mr. Curry: Name them out loud. A. Reuben Jones and Lewis Dorn.

Q. Is he a dairyman: A. No, sir, he works in a mill.

Q. What does he buy? A. Groceries.

Q. Does the city of Augusta license you to do a retail business, Mr. Hammond? A. No, sir, only wholesale; I am operating under a government license.

Q. How do you mean operating under a government license? A. A veterans license; just grocery business.

Q. You get an application from the Ordinary and get your license from the Revenue Department in Atlanta? A. Yes, sir, just the grocery business. Q. You don't operate that under a city license? A. No, sir.

Q. Does the license you obtain from the state of Georgia authorize you to do a retail business? A. I don't know sir; I just have a grocery license.

Q. That is the only kind of license you get, grocery license? A. Correct.

Q. Not retail? A. No, sir.

Q. Just a grocery line? A. Correct.

Q. You did not apply for and they did issue you a wholesale license? A. No, sir.

Q. Examine this certified copy of your license issued by the state revenue department and the application and tell me are those the licenses under which you do business and the application under which you got the licenses? A. No, sir, that is not correct; no sir, I never have operated under a wholesale license.

Q. Examine them carefully please and also the applications attached to them. The Court: Are they photostatic copies. Mr. Chance: Yes sir. The Court: Is that your signature on the application A. Yes sir. The Court: It is your signature? A. Yes sir, but I don't see where it says anything about a wholesale license; this wholesale written in here I don't know anything about that.

Q. Your signature is on both applications? A. I don't see but one.

Q. Look at this one? A. Yes, that's mine.

Q. Both of them? A. Yes sir.

Q. That is the applications you made? A. I signed it; but I have never had any wholesale grocery license to operate; it was always just groceries.

Q. Do you deny that these are the licenses issued to you by the state revenue department? A. I never had one for a wholesale license.

Q. I asked you, do you deny that these are the licenses issued to you? A. I say that is not; I have never had that in my place of business.

Q. Read it over carefully, Mr. Hammond, and answer my question. The Court: I understand he says the license he got reads groceries, and if that says wholesale he denies it is a true copy.

Mr. Chance: "Well, your Honor, I want to read into the record from the application he made: "In what business are you engaged? Wholesale grocery business"; and in the other one in answer to the same question he said Wholesale groceries".

As to the total volume of business done by me during the 1939 to 1941 period I could not tell off hand, the year around would run about $90,000.00. As to my making a statement to Dun & Bradstreet in which I said my business in 1940 was $105,000.00, if they said so that is correct. Some years it was from $85,000. to $90,000. One year I remember it went up to about $105,000., probably in 1940. I did not make a statement to Dun & Bradstreet that in addition to wholesale and retail grocery business my patronage was larger from farmers who conduct commissaries on their farm. No sir, we haven't got a man running a commissary. We are not selling them a thing. No sir, we haven't got such a man. I have not made any such statement. I am willing for any signed statement by me to be delivered to the court if you have one, but we did not sell them. As to whenter I declined to make a statement to Dun & Bradstreet in September 1942, not that I know of.

RE-DIRECT EXAMINATION BY DEFENDANT

It would be impossible for a wholesale grocery to exist on a $105,000. business a year. As to having a bookkeeper to keep correct books, they not be very correct. We keep books. I have had someone since 1938.

The Court: "Would it be possible, you think, for him to prepare, first, how much of your retail business from October 23, 1938 to August 1, 1942 represented sales in Georgia and, second, how much in South Carolina or any other state?" Mr. Curry: "Yes sir, I think so." The Court: "And how much during the same period at wholesale, and how much at retail - breaking it down by years?" A. "Yes sir, I think so. The Court: "Some reference has been made to stationery, letterheads and bills, as a wholesaler; is that correct?" A. "Yes sir, that is correct,

but we only have one day's work out and we use that that day. The Court: "You use that with wholesale printed on it in all departments?" A. Yes sir.

RE-CROSS EXAMINATION

Retail groceries and wholesale groceries are classified in the Augusta telephone directory I think. Looking at the 1939 city directory which you show me, I am classified as a wholesaler, and looking at the city director I am classified that way. As to whether I have ever asked them to classify me as a retailer, I guess they just looked and saw that I was already classified that way. It might be that I have advertised in the city directory as a wholesaler. We sell some wholesale. It might be true that I am classified as L.C. Hammond & Company. As to whether that was at my direction I don't know how they got it, it might have been one of the boys that have been put on the stand did it. As to whether Polk & Company came there for information like that, they may have talked to the negro boys. As to my being listed along with the Planter, McElmurray and Smith Brothers and all other strictly wholesalers, I reckon so, you are looking at it. From 1938 right on through 1942 I am listed along with the other exclusive wholesale groceries in Augusta.

I do not know that I have ever gone to any telephone directory or city directory and asked them about an advertisement that I was conducting a retail business. We don't do any advertising. As to the public knowing what kind of business I run, they see the stuff displayed all over the store, a pound of this and a pound of that and tobacco and the whole from of the store is made up of broken packages. The front of any wholesale business has to have an office and I had to have an office space for wholesale business, that is what I am talking about. We don't have an office and doing a wholesale business you would have to have an office; could not operate without it. I don't know whether I stated to Dun & Bradstreet that this place was

156 feet deep, I never measured it. Out of this about 35 ft. was taken up for the counter and cash register space, that is correct.

RE-DIRECT EXAMINATION BY DEFENDANT

There has never been a time when I was not doing some wholesale business. I do not make any contention that I never did any wholesale business. I do not make that contention, but what I do contend is that I am a retailer and not a wholesaler. As to my business license for 1943, I can get it.

F. P. Bailey, a witness for the defendant, being duly sworn testified as follows:

I am bookkeeper for L.C. Hammond & Company. I was in 1938 and have been for 12 years. The wage and hour people came to inspect the books. He stayed there about two days. He made an average of the retail and wholesale sales and said the percentage of wholesale was slightly under 20%, yes, sir, he came in since then and said the wholesale business had not increaded.

I have recently examined my books to see how many wholesale customers I have. I have about 45. I saw this list of names that started back before 1937, and some of the names were on the books in 1931. There are more than 100 names that were on there in 1937, and have long ago been discarded. We never see them any more, and they were not customers at all when the law went into effect in 1938.

I know these two boys that testified here this morning. They were engaged one day in interstate commerce each week. On a Wednesday morning they would come to the place about 7 o'clock. They would get out about 10 o'clock. They would usually get back about 3:30 or 4 o'clock in the afternoon. They would make deliveries in South Carolina, in Edgefield and Aiken and McCormick Counties and on the road to Fury's Ferry. As to my estimate of the retail sales each day, according to my register it shows an average of from 100 to 150 a day, around 500 on Saturday.

CROSS EXAMINATION BY PLAINTIFF

As to some of the customers that I served other than South Carolina farmers and dairymen, there was H. L. Huitt every week, about $15.00 worth. He fed it to his cows I guess, and Mrs. A.A. Powers practically every Saturday a sack of dairy feed and groceries. I do not know whether she sells any of it or not. D.C. Pirkle, a farmer, we sold him $30 to 45.00 a month, and E.E. Hare at Grovetown, a dairyman, almost every day, two to four bags. He is a retail dairyman. M.C. Head, he buys cow feed, runs a dairy, retails milk, buys feed for his cows, and Mrs. Lunceford she buys groceries. She is a next door neighbor, and J. Y. Haynes.

Q. You were served with a subpoena to bring your books to court showing your accounts payable and receivable to date? A. Yes, sir, I have them in the truck outside. Q. Are any of these accounts shown on them? A. Yes, sir, every one of them, and every account that has done business with us since 1938 appears on those books, retail and all, they are all on them.

Q. Are their addresses on the books? A. No, sir, very few addresses. Q. Why didn't you put the addresses on it? A. I don't know that I have any particular reason. Q. Isn't it quite unusual to have customers on your books and no addresses? A. No sir, I don't think so. I may have a half a dozen with the addresses and the rest without them.

Q. Are any of the addresses scratched out? A. No sir, not a one."

It is not true that from 75 to 90% of our wholesale and retail business is in South Carolina. Each one comes in and spends his money and I am glad to say we have got a lot of good Georgia customers, but we have no commissary customers. But nobody could tell from examining our books where all these customers live unless they knew them personally like I do. As to the list of 160 retail grocery merchants that our traveling salesman identified this morning which we were actively doing business with, I had the pleasure of checking the list

checked some I know we have not done business with in six months. I would swear that Mrs. Metts has not bought anything from me in six months. The ones that Mr. McKie called on, I kept the information at the desk, I kept the books, the ones that are checked are the ones that McKie worked. I meant the ones not checked are his customers. As to how I knew what ones he called on, I kept the books. I handle all collections and everything went through my hands, and I would call on the customers after he left. I did not find out which ones he called on. I just knew them. That was my job, just called on them. I have all the records there.

RE-DIRECT EXAMINATION BY DEFENDANT

This is the license for 1942 I have here. It says Louis C. Hammond "to conduct the business of grocery". As to there being anybody on the books that I can't tell where they live, there is not a one. They are well known people. I know them all. If they had not been they would not be on the books. I have all my books down in the car, if they want to see them. I brought them all, a pretty big bundle of them. They are right down in the car here. My records are in such shape that I can identify every sale made in South Carolina and every one made by McKie. Beginning October 23, 1938 the average annual sales for 1939 to 1942 were from $90,000. to $105,000. If I remember right $105,000. was the peak.

"The Court: Call it an average of $100,000 for 1939, 1940 1941 and 1942, listen carefully. Lumping your wholesale and retail sales together, calling it all one business and counting deliveries at your store to South Carolina customers in the same fashion as Georgia residents, but putting on this side deliveries you made in South Carolina - I understand all of that was by truck - how much of the $100,000 annual sales would you say represent sales not only direct to people in South Carolina but goods you delivered there by truck; how much of that

$100,000 would you say represented that kind of business? A. That would be purely an estimate, but it would be I would say 15% or 20%.

"The Court: Not over that? A. No sir. The Court: You delivered no goods there except by truck; did you ship any? A. No sir, just by truck.

"The Court: There was some reference made to the wage and hour people calling on you; do you remember the date? A. Not definitely. The Court: Do you know the year? A. I think it was in the fall of 1939. The Court: That would be about a year after the law went into effect? A. Yes sir.

"The Court: Did they leave or write any letter or leave any documents showing how they interpreted your business, and whether it was subject to the act? A. No sir, the only thing Mr. Moye contacted us and we talked. The Court: That was the inspector? A. Yes sir. The Court: Did the inspector tell you whether you were classified as a retailer or wholesaler? A. No sir, he just said what percentage of the business was wholesale.

"The Court: Did he say whether he classified you as a retailer or a wholesaler? A. No just said we were doing a little less than 20% of wholesale. The Court: Did he tell you whether he expected you to comply with the act? A. He said we didn't come under it. The Court: Have you had any other inspection since that time? A. A few months later another inspector came in there; I did not know his name; and he asked about the business and we told him when Mr. Moye had inspected us, and then he said it was not necessary to inspect us again. The Court: Mr. Moye is the only one who inspected you? A. Yes sir."

RE-CROSS EXAMINATION

I never had these business licenses nailed up in a conspicuous place in the store. I kept them right where I could touch them in a minute if called for.

J. H. McKie, recalled for plaintiffs, testified:

DIRECT EXAMINATION

Since I was here before I have had occasion to examine the sign that now appears on the storehouse of L.C. Hammond & Company, the sign that is now on the store was not on the store when I left their employ, that sign on the window was painted since Christmas. I saw the man painting it since this last Christmas. The sign is now "Hammond & Company, Groceries and Feeds." When I was there, there was one sign hanging over the sidewalk, "L. C. Hammond & Co. Wholesale Groceries & Feeds", I have never seen any bills or letter heads come out of there that did not have "Wholesale Groceries" on them. I have never seen a circular or bill or letter head come out of there with anything about retail on it. I see his trucks now two or three times a week. They have "L. C. Hammond & Co., Wholesale Groceries & Feeds

CROSS EXAMINATION

This sign hung over the sidewalk, I believe I would know it if I saw it again. I have not seen it at his store recently. I don't know when he took it down, but I know it said "Wholesale" on it. This sign is not up there. As to going up there now and looking at the sign, it could be changed. I haven't got to go up there.

Victor Sherwood, sworn for the defendant, testified:

DIRECT EXAMINATION

My business is a sign and house painter. I painted the sign for Hammond & Company. I painted it first a year ago last Fall in August or September. I saw the sign before that one, I put "L. C. Hammond & Co." in a straight line instead of in a curve line. I painted it last January, I just took that one off and painted it over. There was not any word of "Wholesale" on it then. There is not any on it now. I remember the sign over the street. It was exactly the kind on the window. It is just like it was before it was taken down. The word "Wholesale" wasn't on it. It is not there now, that sign is sitting behind the counter, the frame got broke and we took it down. The sign is about four or five feet long and three feet high.

CROSS EXAMINATION

Mr. Hammond did not tell me why he was changing his sign so much lately. The one on the window was worn badly. The weather had affected it. It was hot weather when I painted it. The weather chipped the end and I asked him if he wanted it painted over, and he said Yes. That is the same sign I painted last year and had to paint it again this year. They very often wear off of a window. Mr. Hammond did not change the wording. It was exactly the same as it is here.

RE-DIRECT EXAMINATION

I do these painting jobs - people see me painting signs and just ask me how much I charge to do it. I have painted signs for Whatley and for Harbison and all on Broad Street. I am right there in the same block I go around practically every year or so and ask them about their signs. I keep nearly all the signs up and down Broad Street in pretty good shape. I ask them about it and see them when it ought to be done.

The plaintiffs introduced in evidence documentary evidence, the substance of which is as follows:

A revised list of retail grocery stores - customers of L.C. Hammond & Company from 1938 to 1941 - the said list of retail grocery stores being numbered 153, 71 of which were located in the State of South Carolina, and 82 of which were located in the State of Georgia. These are the retail grocery stores served by L. C. Hammond & Company and referred to in the testimony of the plaintiffs.

The plaintiffs also introduced in evidence the business license issued for 1939 to the defendant by the State Revenue Commissioner of Georgia, and which authorized the defendant to "conduct the business of a wholesale grocery business". The defendant in order to procure this business license made the following affidavit before the Ordinary of Richmond County, Georgia:

"REGISTRATION CARD FOR VETERAN'S CERTIFICATE OF EXEMPTION.

(All questions contained in this application must be answered by the applicant.)

Name Louis C. Hammond Post Office 1283 Broad St. Augusta, Ga.

Are you a citizen of Georgia? Yes. Race: White.
Date of Birth June 9, 1891. Veteran of what war: World.
When and where did you enter service? Edgefield, S. C. June 26, 1918.
In what unit did you serve? 4th Corp. Artillery.
When and where were you discharged? New York, June 26, 1919.
Nature and percentage of disability. Twenty-five per cent.
In what business are you engaged? Wholesale grocery business.
When did you enter into the operation of such business? June 1931
Was this business carried on by you in 1938? Yes. 1937? Yes. 1936? Yes.
How many people did you employ in 1938? Four. In 1937? Five. in 1936? 3.
How many places of business do you operate? One. Where is each located? This one 1283 Broad St., Augusta, Ga. What was your net income for the past year? $1800.00. Number of dependents. Four. Mrs. L.C.H., Misses Jewel 4, Christine 6, Imogen 11. Did you make an income tax return to the Federal Government for the past taxable year? Yes. How much income tax did you pay? None.
Ordinary issuing certificate: Oswell R. Eve. Richmond Co. Feb. 15, 1939
License issued 3-11-39

Subscribed and sworn to before
me the 15 day of February 1939

Louis C. Hammond

C. J. Vaughan, Jr.
Notary Public, Richmond Co., Ga.
Commission expires April 21, 1940.

Approved: C. F. Scoggins, Inspector.

The plaintiffs introduced in evidence the business license issued for 1940 to the defendant by the State Revenue Commissioner of Georgia, and which authorized the defendant to "conduct the business of a wholesale grocery business." The defendant in order to procure this business license made the following affidavit before the Ordinary of Richmond County, Georgia:

"REGISTRATION CARD FOR VETERAN'S CERTIFICATE OF EXEMPTION.

"All questions contained in this application must be answered by the applicant."
Name Louis C. Hammond, Post Office 1283 Broad St. Augusta.
Are you a citizen of Georgia? Yes. Race: White
Date of Birth. June 9, 1891. Veteran of what War? World.
When and where did you enter service? June 26, 1918, Edgefield, S. C.
In what unit did you serve? 4th Corp. Artillery.
When and where were you discharged? June 26, 1919, New York.
Nature and extent of disability. 25%.
In what business are you engaged? Wholesale Groceries.
When did you enter into the operation of such business? 1931.
Was this business carried on by you in 1939? Yes. 1938? Yes. 1937? Yes.
How many people did you employ to assist in conducting your business in the year 1939? 5. How many people did you employ in 1939? 5. In 1938? 4. In 1937? 4. How many places of business do you operate? 1. Where is each located? 1283 Broad St., Augusta, Ga.
What was your net income for the past year? $500.00. Number of dependents? 4. Mrs. Pearl, Misses Imogene 12, Christine 7, Jewel Hammond 4.
Did you make an income tax return to the Federal Government for the past taxable year? Yes. How much income tax did you pay? None.
Ordinary issuing certificate John C. Harper, Jan. 7, 1940.
Subscribed and sworn to before me
the 18th day of January 1940 Issued 1-26-40.
C. J. Vaughan, Jr.
Notary Public, Richmond Co., Ga.
Commission expires April 21, 1940. L. C. Hammond."
Approved: J.F.Scoggins, Inspector.

The plaintiff introduced in evidence the written authority of George Harris as the designated agent in writing to act for the other plaintiffs under the Fair Labor Standards Act in collecting any wages due them under the Act.

The defendant introduced in evidence a business license from the State Revenue Commissioner of Georgia for the year 1942 which recites that it was issued to the defendant to "conduct the business of Grocery".

No affidavit or application to the Ordinary of Richmond County was introduced in connection with this business license.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA - Augusta Division.

George Harris, Individually, Etc.
v.
L. C. Hammond, Operating as L. C. Hammond & Company.

Civil Action.
No. 176.

Lovett, J.

By consent of the parties this case was heard by the court as trior of the facts.

My findings and conclusions follow.

FACTS

The suit is by three former employees of defendant to recover unpaid minimum wages, overtime compensation, liquidated damages, attorney's fees and costs under the Fair Labor Standards Act of 1938. 29 U.S.C., Sec. 201, et seq.

Plaintiff McKey, who was paid $20. a week for his services, sues for overtime compensation, etc., from October 23, 1938 to December 24, 1939, alleging he worked 75 hours each week during that period. The plaintiff Harris; paid $11 per week for his services, alleges he worked 76 hours per week from October 23, 1938 to June 15, 1941. He sues for unpaid minimum wages, overtime, etc. Plaintiff McDaniel, paid $11 per week from October 23, 1938 to April 15, 1941, $15 per week from April 15, 1941 to March 25, 1942 and $20 per week from March 25, 1942 to August 1, 1942, sues for unpaid minimum wages, overtime compensation, etc.

The question is whether these employees are within the coverage of sections 6 and 7 of the Act.

Since 1931 the defendant has operated a grocery and feed business in Augusta, Georgia, a city on the state line between Georgia and South Carolina. There is a dispute between the parties as to whether he conducted a retail establishment or was a wholesale grocer. He

sold and delivered some goods to customers in South Carolina, where he lived before he entered business in Augusta, Georgia.

The defendant's place of business is located on the first, or street level, floor of a 2-story brick building on the main business street in the retail district of Augusta. The second floor is given over to apartments where people dwell. The store is 30 or 40 feet wide and between 140 or 150 feet long. The front portion of it nearest the street, and extending 35 or 40 feet towards the rear, contains shelves, counters, display cases and racks, a cash register and the usual equipment found in a retail grocery store. Photographs in evidence disclose that it has large plate glass windows, in front of which on the sidewalk and behind which goods are displayed in the usual manner of a retail grocery store. A partition without a door, already in the building when the defendant rented the premises, separates the front end from the rear. The rear compartment is used as a warehouse and storage room, principally for grain, hay and other feed stuffs of that type. Entrance to the rear compartment is at or near the rear of the building. One entering the front door of the store from the street has a view of what would appear to be a retail grocery store.

No manufacturing, production or processing of goods for commerce is undertaken or done by the defendant. He does not even mix the feed which he sells.

During the years in controversy the gross sales of the defendant were between a minimum of $90,000 and a maximum of $105,000 per year. Less than 20% of the gross sales represent non-retail sales, or what the plaintiffs characterize as sales at wholesale. Not exceeding 15% or 20% represent sales of goods delivered to customers in South Carolina. According to statements made to credit agencies his stock of merchandise varied from $15,000 to $18,000. They reported him as both a retail

and a wholesale grocer. His accounts receivable ran around $4,000. Among the principal customers of the defendant are dairymen, poultrymen and farmers owning cattle and live stock and who purchase feed stuffs in larger quantities than a retail grocery store ordinarily would sell. Some of these customers are in Georgia; some in South Carolina. Some South Carolina customers call at defendant's store and purchase and take delivery there, using their own trucks for the purpose. However, defendant operates one truck of his own - and only one. One day each business week he makes deliveries in South Carolina with this truck. No goods are shipped out by railroad. On the side of defendan's one truck is painted defendant's name, followed by the words "Wholesale Grocer". He also used stationery and invoices on which the words "wholesale grocer" appeared. Occasionally he and others in the retail grocery business pooled their purchases and bought in quantities, carload lots, using his name to do so, and on arrival they parceled out the goods among themselves. All goods purchased came to rest in the warehouse portion of the store. They were not ordered on pre-existing contracts or understandings with customers in or out of the state, with the exception noted as to the pooling of purchases, though some of those from whom he bought were located and shipped the goods to him from without the state. On arrival he had no way of knowing whether the commodities he bought would be sold to any particular customer anywhere. He served the public and sold indiscriminately to any one willing to buy and who called at his store on the principle of first come first served. His business licenses from the state sometimes described him as a wholesale grocer and at other times simply as a grocer. In the City and telephone directories he was classified among the wholesale grocers. On the plate glass windows of his store appeared the words "L.C. Hammond & Company, Groceries and Feeds". There was also a sign extending over the sidewalk reading the same way. Between 100 and 150 custo-

tomers daily during the week and on Saturdays about 500, admittedly buying at retail in small quantities, were served over the counter in the front end of the store. His customers in South Carolina at no time exceeded 40 or 50 people. Over a period of years, counting both old customers to whom he no longer sold and the new and current ones, the number was larger.

One of the plaintiffs, McKay, spent one day each week soliciting orders and making collections in South Carolina, and for the balance of the week he worked in the store either in the warehouse space or in what for convenience, I shall call the retail department. He was not employed ariginally as a salesman to travel; he took over that work when the defendant himself had to give it up on account of ill health. Another, Harris, drove the truck for one day each week into Sough Carolina making deliveries of goods sold to customers there, and when not so engaged hauled goods in the truck from the railroad delivery tracks to the store and unloaded and handled goods in the warhouse department (some of which came from without the state) and carried packages from the retaildepartment to the street curb to parked automobiles of customers. The third plaintiff, McDaniel, assisted the truck driver in the performance of his work. The truck driver and his helper when going into South Carolina would leave the store around ten o'clock in the morning and return by 3:30 or 4:00 o'clock in the afternoon, one day each week, usually on Wednesday, and enroute to South Carolina would make deliveries in the State of Georgia if the business so required.

In 1939 or 1940 an inspector from the department of labor, wage and hour division, examined the defendant's records and inspected his store. He found the percentage of non-retail, or wholesale, business in dollars at that time less than 20% of the whole, and informed the defendant his business was not subject to the Fair Labor Standards Act, being exempt under section 13 (a) (2), (29 U.S.C.Sec.213 (a)(2) as a

retail establishment the greater part of whose selling was in intrastate commerce. A second inspector, coming in later, confirmed the earlier inspector upon finding the so-called wholesale sales had not increased.

DISCUSSION

There are two questions for decision. The first is, are these employees engaged in a retail establishment, the greater part of whose selling is in intrastate commerce, with respect to whom by section 13 (a) (2) of the Act sections 6 and 7 are made inapplicable. Secondly if theyare not, if the defendant is a wholesaler, are these employees covered by the Act in all of their activities; were they wholly "in commerce" and entitled to invoke the Act for all of the services they rendered, or only where the services had some immediate relationship to interstate commerce. Collaterally there is the question of where the burden of proof rests.

It should be noticed we are dealing here with one who neither manufactures nor produces goods for commerce. A producer under the Act is treated very differently from onw who merely sells either at wholesale or retail. As to the manufacturer or producer Congress made no distinction as to the volume or amount or shipments in the commerce or of production for commerce by any particular shipper or producer, provided it was substantial. It recognized that in present day industry competition by small concerns may affect the whole, and that the total effect of the competition of many small producers may be great. U.S. v. Darby, 312 U.S. 100, 123; Davis v. Goodman Lbr. Co., 133 F. 2d 52, 53; Walling v. Peoples Packing Co., 132 F. 2d 237 (6); Ling v. Currier, 50 F. Supp. - Samuels v. Houston, 46 F. Supp. 364,366. It is different as to a retail establishment, by the express terms of the Act Congress said the provisions of sections 6 and 7 relating to minimum wages and overtime compensation should not apply with respect to "(2) any employee engaged

in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce". Section 13 (a) (2), 29 U.S.C. Sec. 213 (a) (2). As to wholesalers, all phases of their business selling intrastate are not necessarily covered by the Act because the purchases are made interstate. Walling v. Jacksonville Paper Co., 317 U.S. 564; 570-71; Higgins v. Carr Brothers Co., 317 U.S. 572; Reuter v. Walling (5 Cir.). ___F. 2d ___, decided July 22, 1943. "We can not be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. Congress did not exercise in this Act the full scope of the commerce power, as was stated in Kirschbaum v. Walling, 316 U.S. 517, 522-23 . . . There is, however, no indication in the legislative history that but for the exemption of retailers it was thought that all movement of goods from manufacturers to wholesalers and on to retailers would be 'in commerce' within the meaning of the Act, where the wholesalers and retailers were in the same state. It is quite clear that the exemption in Sec. 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate to sales . . . and the exemption for retailers contained in Sec. 13 (a) (1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included . . .Hence we can not conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." Jacksonville Paper Company case, supra.

Therefore, we first turn to a consideration of defendant's activities.

Was he in any true sense a wholesaler doing an interstate business?

To establish that he was the plaintiffs say he solicited retailers in South Carolina to buy goods from him one day each week; that he held himself out to some of his customers and to those from whom he

bought as a wholesale grocer; his truck had those words painted on its sides; he was so listed in the telephone and city directories; his stationery and invoices so claimed - - and that these facts are undisputed. On the other hand, when we consider the kind of store he operated its appearance, customers, etc., the volume of his business, the amount of his inventory, the accounts receivable, etc, together with the fact that his quantity sales were less than 20% of his total sales, it seems reasonably clear to me that in no genuine sense was he a wholesaler. Certainly his total quantity sales, and particularly his sales outside of the state, could not have kept him in business very long unless he had his sales at retail to add to them. The evidence is silent as to prices charged in cases where sales were made in quantity or at wholesale. It is fair to assume that some discount was allowed, but it is also conceivable that the customers in South Carolina may have been willing to pay Augusta retail prices if deliveries were made to their doors without cost to them. The defendant undoubtedly posed as a wholesaler in some relationships and for some purposes. I am inclined to think this he did in order to buy more cheaply rather than to sell to those who sell again, which is the ordinary test for determining if one is a wholesaler. It is the business activities, not what he calls himself, that should control. See White Motor Co. v. Littleton, 124 F. 2d 92; Prescription House, Inc., v. Anderson, 42 F. Supp.874; Duncan v. Montgomery Ward & Co. 42 F. Supp. 879; Snavely v. Shugart, 45 F. Supp.722; Zehring v. Brown Materials, 48 F. Supp. 740. When it is remembered that all of the quantity sales of defendant in South Carolina were within a few miles of the city of Augusta, Georgia, within what might be called its retail trade territory, more or less in the same section from which he originally came and where his personal friends doubtless resided, that in the beginning and before the plaintiff McKay was employed the defendant himself personally drove his automobile one day each week into

that trade territory and saw his customers in person, that he did not employ the plaintiff McKey in the beginning as a salesman or solicitor and only because of the ill health of the defendant himself did McKey take over that work, that the volume of such business was relatively small in dollar values, it seems clear to me that the quantity sales interstate were merly incidental to defendant's intrastate business, which intrastate business was predominently the thing out of which he made the living.

Were the plaintiffs engaged in a retail establishment? If so, they can not invoke the Act, for clearly by the dependable evidence it was shown the greater part of the selling by the establishment was intrastate.

If we look to the Interpretative Bulletins of the Administrator set up by the Act (Bulletin No. 6, June 1941) as an aid to the determination, which we may do not as conclusive but as having persuasive value because it is a contemporaneous construction by an officer charged eith enforcement of the Act (U.S. v. American Trucking Ass'n. 310 U.S. 534,540; Walling v. American Stores, 133 F. 2d 840,843), we find the physical appearance and equipment of defendant's store as well as his manner of selling over the counter squarely within his description of a retail establishment. See Prs. 9 to 14.

The volume of sales retail and non-retail also bring him within the exemption according to the Administrator's bulletin. It is there said (par. 18): "For purposes of enforcement the Administrator will ordinarily consider the non-retail selling of an establishment to be substantial if the gross receipts from such selling constitute more than one quarter (25 per cent) of the total gross receipts of the establishment". Feed establishments selling in large quantities and at a discount from the regular retail price are considered in the Bulletin

(pars. 63 and 64). The Administrator applies the same 25% test to determine if their non-retail sales are substantial. He says "In some cases, owever, an establishment sells feed, hay, fertilizer, etc. in large quantities and at a discount from the regular discount price. For example, feed is sold to feed stores, large commercial poultry and dairy farmers, urban users of horse feeds, non-farming feeding and fattening stations. In the ordinary case these sales are not retail sales, and if such sales constitute a substantial portion of the selling . . . it may not be considered a retail establishment under the exemption. See par. 18 (the 25% par.) for a discussion of 'substantial' "(emphasis mine).

Some of our courts have reached the same conclusion where the non-retail or wholesale sales were casual, incidental or unsubstantial only. Prescription House v. Anderson, Duncan v. Montgomery Ward & Co., and White Motor Co. v.Littleton, supra. See also Stucker v. Rosele, 37 F. Supp. 864, 865(8,9),867; Moses v. McKesson & Robbins, 43 F.Supp. 528 (2) 529. The only reported case where a different view was entertained seems to be Petway v. Dobson, 43 F. Supp. 277, by District Judge Davies of the Middle District of Tennessee. Some of the facts are strikingly like the case at bar. But there are also differences. Unlike here it was admitted that the larger proportion of defendants business was in interstate commerce, and twenty five percent of the total sales made were wholesale. Here the ration is much lower.
he plaintiffs were engaged in a retail establishment the greater part of whose selling was in intrastate commerce.

This opinion might well end here. But there are other aspects of the case which for future guidance of the parties properly may be discussed briefly. One of them relates to the over-time compensation claimed by the truck driver and his helper while engaged in hauling

goods from the railroad to defendant's warehouse, some of the goods coming from outside of the state. While so engaged for a substantial portion of their time, if the defendant had been a wholesaler, they would have been engaged in interstate commerce and within ghe cover ge of the minimum wage provision of the Act but without the overtime provisions. Jax Beer Co. v. Redfern, 124 F.2d 172,174; Walling v. Goldblatt Bros., 128 F. 2d 778(6),782; Southland Gasoline Co. v. Bagley, ___U.S. decided May 3, 1343; Walling v. Silver Bros. Co. (1st Cir.)___F. 2d___. decided May 21, 1943; Reuter v. Walling, supra. How much of their time, however, was given to such hauling has not been shown. Where an employee works both interstate and intrastate he must point out what part of his work is given to each. Supercold Southwest Co. v. McBride, 124 F. 2d 90 (5), 92; Snavely v. Shugart, supra; Samuels v. Houston, 46 F.Supp.364,367; Bracey v. Luray, 49 F. Supp. 821 (9). On the other hand, if the defendant had been a wholesaler, and these employees during a given work week interchangeably engaged in work in a department involving only intrastate business and another involving interstate commerce (even if it could be found here the business was sufficiently departmentalized as to segregate the two departments, which I think has not been shown) the employer would have been required to pay the wages prescribed by the Fair Labor Standards Act for the entire time worked, including time spent in the department involving intrastate business alone. Fleming v. Knox, 42 F. Supp. 948; Ling v. Currier Lbr. Co., supra.

CONCLUSIONS

1. The court has jurisdiction of the parties and the subject matter under section 16 (b) of the Fair Labor Standards Act of 1938, 29 U.S.C. Section 216 (b).

2. By the express terms of section 13 (a)(2) sections 6 and 7 of the Act are not applicable to the plaintiffs.

3. Judgment shall be for defendant. Let it be presented on notice.

This August 11th 1943.

Archibald B. Lovett,
United States Judge.

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U. S. District Court, Augusta Division. Filed in office this August 12, 1943 at 9:00 A.M. Scott A. Edwards, Clerk, By Orlena T. Weaver, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

GEORGE HARRIS, Individually and as the designated Agent of Ellis McDaniel, et al, PLAINTIFF

VS.

L. C. RAYMOND, Operating and doing business as L.C. RAYMOND and COMPANY, DEFENDANT.

CIVIL ACTION
No. 176.
JUDGMENT

The Court having found that it has jurisdiction of the parties and the subject matter under section 16 (b) of the Fair Labor Standards Act of 1938, U.S.C., Section 216 (b), and that by the express terms of section 13 (a)(2) Sections 6 and 7 of the Act are not applicable to the plaintiffs, judgment is hereby entered for the defendant and it is so ordered and adjudged.

This 28th day of August, 1943.

Archibald B. Lovett

JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION.

Copy of the within judgment received.
This 20 day of August, 1943.

Paul T. Chance.

U.S. District Court, Augusta Division. Filed in office this September 1, 1943 at 4:30 P.M. Scott A. Edwards, Clark, By Dorothy H. Murray, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION.

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GEORGE HARRIS, INDIVIDUALLY, ETC.
VS.
L. C. HAMMOND, OPERATING AS L. C. HAMMOND & COMPANY

CIVIL ACTION NO. 176.

TO L. C. HAMMOND & COMPANY, OR
ITS ATTORNEYS OF RECORD, CURRY & CURRY:

Notice is hereby given that George Harris and Ellis McDaniel, plaintiffs in the above named and stated case, hereby appeal to the Circuit Court of Appeals for the 5th Circuit, from the decision of the District Court, entered August 11, 1943, and final judgment of the District Court entered in this action on the 28th day of August 1943.

signed: Paul T. Chance
ATTORNEY FOR PLAINTIFFS

Due and legal service of the foregoing notice of appeal is hereby acknowledged. Copy received and all other and further notice and service waived.

This the 14 day of October, 1943.

Signed: Curry & Curry
ATTORNEYS FOR DEFENDANT

U.S. District Court, Augusta Division. Filed in office this October 14, 1943. Scott A. Edwards, Clerk, by Dorothy H. Murray, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF GEORGIA,
AUGUSTA DIVISION

GEORGE HARRIS, INDIVIDUALLY, ETC.

VS.

L. C. HAMMOND, OPERATING AS L. C. HAMMOND & COMPANY.

CIVIL ACTION NO. 176

ASSIGNMENTS OF ERROR

The appellants rely upon the following grounds of error, to-wit:

1. Because the rulings of the court dated August 11, 1943 and the final judgment entered thereon dated August 28, 1943, rest upon the conclusion of the trial court that the defendant operated a "retail establishment", and we respectfully submit that such conclusion and finding is clearly erroneous in that:

(a) It appears from the evidence and without question or dispute that the defendant does not operate a retail establishment within the meaning of the Fair Labor Standards Act.

(b) It appears that the court in reaching such a conclusion has applied the doctrine maxim de minimis to the volume of wholesale business done in interstate commerce by the defendant and that such rule is inapplicable under the law and facts of the case.

(c) It appears from the undisputed evidence and was so found by the trial court that the defendant at no time attempted to segregate his wholesale business from that which he claimed to be retail, and that upon the trial the defendant made no bona fide effort to show or estimate the amount of intrastate retail business transacted by him.

(d) It appears from the undisputed evidence in the case

and was so found by the court, that appellants were employed by defendant as truck drivers and warehouse employees, and that as such appellants were continuously engaged in interstate commerce in connection with the defendant's wholesale business, and that they had no duties connected with any alleged retail business.

2. That said rulings of the court and final judgment are erroneous for that upon the trial of the case the court in effect eliminated as an issue in the case the contention of the defendant that he operated a retail establishment, and appellants were, in good faith, led to believe that such defenses were eliminated by a ruling made under circumstances, as follows: During the trial and while appellants were offering evidence in support of their allegations that the defendant conducted a wholesale business, it then appeared from the undisputed evidence that the defendant had, as regular customers, 153 retail merchants to whom the defendant sold continuously in wholesale quantities in the States of South Carolina and Georgia, and appellants were proceeding to prove by these merchants the volume of wholesale business done by the defendant with them, whereupon the following inquiry from the court and ruling thereon was made, as appears on page 10 of the brief of evidence, to-wit:

"BY THE COURT: 'Are these witnesses Mr. Chance for the purpose of establishing the character of business as wholesale or retail? Mr. Chance: 'To show that they were primarily purchasing goods from Hammond as a wholesale merchant in volume.' By the court: 'I will limit you to three witnesses. It is cumulative testimony.' "

3. That said rulings and final judgment of the court are erroneous because it appears that the finding of the court that

defendant's wholesale business "was less than 20%" is based entirely upon the following hearsay evidence elicited by the court and appearing on page 21 of the brief of evidence as follows:

"The Court: There was some reference made to the wage and hour people calling on you; do you remember the date? A. Not definitely. The Court: Do you know the year? A. I think it was in the Fall of 1939. The Court: That would be about a year after the law went into effect? A. Yes sir.

"The Court: Did they leave or write any letter or leave any documents showing how they interpreted your business, and whether it was subject to the act? A. No sir, the only thing Mr. Moye contacted us and we talked. The Court: That was the inspector? A. Yes sir. The Court: Did the inspector tell you whether you were classified as a retailer or wholesaler? A. No sir, he just said what percentage of the business was wholesale.

"The Court: Did he say whether he classified you as a retailer or a wholesaler? A. No just said we were doing a little less than 20% of wholesale."

That the said finding is contrary to and disregards entirely all of the direct and positive evidence in the case.

4. That said ruling and final judgment are erroneous in that the court in applying the law to the facts, and appearing on page 5 of its decision, ruled as follows:

"There are two questions for decision. The first is are these employees engaged in a retail establishment, the greater part of whose selling is in intrastate commerce, with respect to whom by section 13 (a)(2) of the Act sections 6 and 7 are made inapplicable. Secondly, if they are not, if the defendant is a wholesaler,

are these employees covered by the Act in all of their activities; were they wholly 'in commerce' and entitled to invoke the Act for all of the services they rendered, or only where the services had some immediate relationship to interstate commerce;"
the error being that in order to be covered by the provisions of the Act "all of plaintiff's activities" did not have to be in interstate commerce, and did not have to be "wholly in commerce", and if plaintiffs were covered by the Act then no rule exists for a separation of their wages so as to "entitle them to invoke the Act for all of their services rendered, or only where the services had some immediate relationship to interstate commerce" as ruled by the Court, and such an application of the law was error.

5. That the said ruling and final judgment of the court are erroneous in that it appears by the admission of the defendant and was so found by the court, that the defendant was partly engaged in the wholesale business and in interstate commerce, and that appellants were employed exclusively in that business of the defendant, and the doctrine of maxim de minimis, which the trial court would apply to defendant's volume of wholesale business, has no application to appellants, we most respectfully submit.

WHEREUPON appellants pray: That their grounds of error be inquired into by the Circuit Court of Appeals and that a judgment be entered in accordance with the law and the facts.

Paul T. Chance
ATTORNEY FOR APPELLANTS

U.S. District Court, Augusta Division. Filed in office this October 14, 1943. Scott A. Edwards, Clerk, by Dorothy H. Murray, Deputy Clerk.

Due and legal service of the foregoing assignments of error on appeal is hereby acknowledged. Copy received and all other and further notice and service waived.

This the 14 day of October, 1943.

Curry & Curry

ATTORNEYS FOR DEFENDANT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION.

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GEORGE HARRIS, INDIVIDUALLY, ETC.
VS.
L. C. HAMMOND, OPERATING AS L. C. HAMMOND & COMPANY.

CIVIL ACTION NO. 176.

In person appeared before me the undersigned officer duly authorized by law to administer oaths, George Harris and Ellis McDaniel, who being each first duly sworn depose and say upon oath that they are the plaintiff appellants in the above entitled case; that they are advised and verily believe that they have good cause for appeal from the final judgment entered herein by the District Court on August 28, 1943, and that the said judgment of the Court is without any evidence to support the same and is contrary to law, and that because of their poverty they are unable to pay the cost in said civil action, or the cost on appeal, or to give bond and security for the same, and deponents make this affidavit in order that they may be allowed to prosecute an appeal from said judgment against them without the payment of said costs or giving said security.

Sworn to and subscribed before me this the 13th day of October 1943

Maude L. Doscher
Notary Public, Richmond County, GEORGIA.

GEORGE HARRIS

PVT. ELLIS McDANIEL

The foregoing affidavit in forma pauperis appearing to be in proper form, the same is hereby approved.

This the 14th day of October 1943.

Archibald B. Lovett
UNITED STATES DISTRICT JUDGE

U.S. District Court, Augusta Division. Filed in office this October 14, 1943. Scott A. Edwards, Clerk, by Dorothy H. Murray, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF GEORGIA,
AUGUSTA DIVISION.

GEORGE HARRIS, INDIVIDUALLY, ETC.	
VS.	CIVIL ACTION NO. 176.
L. C. HAMMOND, OPERATING AS L. C. HAMMOND & COMPANY	

The plaintiffs in the above stated case having filed their notice of appeal herein on the 14th day of October 1943, now come and designate as material to an understanding of the errors complained of the following parts of the record and evidence insaid case, to-wit:

1. The plaintiffs' petition filed August 13, 1942.
2. Plaintiffs' amendment filed September 4, 1942
3. The defendant's answer filed on September 1, 1942.
4. Brief of the evidence filed on October 14, 1943.
5. The findings and rulings of the court dated the 11th day of August 1943.
6. The final judgment of the court dated August 28, 1943.
7. Plaintiffs' notice of appeal filed on the 14th day of October 1943.
8. Plaintiffs' assignments of error on appeal filed on the 14th day of October 1943.
9. Plaintiffs' affidavit in forma pauperis filed on the 14th day of August 1943.
10. This designation of the record on appeal.

This the 14 day of October, 1943.

Paul T. Chance

ATTORNEY FOR PLAINTIFFS

Due and legal service of the foregoing designation of the record on appeal is hereby acknowledged. Copy received and all other and further notice and service waived.

This the 14th day of October 1943.

Curry & Curry

ATTORNEY FOR DEFENDANT

CLERK'S CERTIFICATE

In the District Court of the United States for the Southern District of Georgia, Augusta Division.

United States of America,
Southern District of Georgia, ss.

I, SCOTT A EDWARDS, Clerk of the United States District Court for the Southern District of Georgia, do hereby certify that the above and foregoing fifty-five (55) pages, numbered from 1 to 55, inclusive, is a full, true and correct copy and transcript of the record, the assignments of error, brief of the evidence, and of all proceedings had in Civil Action Number 176, wherein George Harris, Individually and as the designated Agent of Ellis McDaniel, et al, is the Appellant, and L. C. Hammond, Operating and doing business as L.C. Hammond and Company, is the Appellee, as fully as the same remains on file and of record in my said office at Augusta, in said Southern District of Georgia.

Witness my official signature and the seal of said Court affixed at Augusta in the Southern District of Georgia, on this the 30th day of October, 1943, and in the 168th Year of the Independence of the United States of America.

SCOTT A. EDWARDS, Clerk,

By Orlena T. Weaver
Orlena T. Weaver, Deputy Clerk.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz: -

ARGUMENT AND SUBMISSION.

Extract from the Minutes of October 3rd, 1944.

GEORGE HARRIS, ET AL.,

No. 10841 versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY.

On this day this cause was called, and, after argument by W. Inman Curry, Esq., for appellee, was submitted to the Court.

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OPINION OF THE COURT FILED - November 1, 1944

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 10841

GEORGE HARRIS, ET AL.,
Appellants,

versus

L. C. HAMMOND, Operating and doing business as
L. C. HAMMOND & COMPANY,
Appellee.

IN FORMA PAUPERIS.

Appeal from the District Court of the United States
for the Southern District of Georgia.

(November 1, 1944.)

Before SIBLEY, HUTCHESON, and McCORD,
Circuit Judges.

McCORD, Circuit Judge: This suit is by three former employees of the defendant to recover unpaid minimum wages, overtime compensation, liquidated damages, attor-

neys' fees and costs under the Fair Labor Standards Act of 1938. 29 U. S. C. Sec. 201 et seq.

The evidence is set out at length in a well considered opinion by the trial judge. Harris v. Hammond, 51 Fed. Supp. 91.

The uestion for decision is whether these employees are wtihin the civerage of Sections 6 and 7 of the Act: "The provisions of Sections 6 and 7 shall not apply with respec to (1) any employee employed in a bona fide *** local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by the regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 29 U.S.C.A.213(a)(1) and

L.C. Hammond was neither a manufacturer nor did he produce foods for commerce. Since the year 1931 he had operated a grocery and feed business at Augusta, Georgia, which is located on the State line between Georgia and South Carolina. While he sold feed to dairy customers, the majority of his sales was made to customers who entered his store. He had a limited number of customers in South Carolina, but a very large majority of his customers numbering between 100 and 150 each day and about 500 on Saturdays, entered his store and bought groceries over the counter. He owned and operated only one delivery truck and this truck was used only a part of one day each week by two employees in delivering groceries in South Carolina.

The evidence is without dispute that the gross sales of the Hammond business for several years past had been between $90,000 and $105,000 per year; that no wholesale grocery

business could survive on such yearly sales. Moreover, his stock of goods varied from $15,000 to $18,000, and the accounts receivable ran around $4,000 and his grocery store was like other retail grocery stores in that section.

In the year 1939 or 1940 an Inspector from the Department of Labor, Wage and Hour Division, examined the Hammond records and inspected his store and found the percentage of non-retail or wholesale business in dollars, at that time, less than 20 percent of the whole, and informed the defendant that his business was not subject to the Fair Labor Standards Act, being exempt as a retail establishment "the greater of whose selling was intrastate commerce." A second inspector coming in later, confirmed the earlier inspector upon finding the so-called wholesale sales had not increased.

The law is now well settled that those engaged in and employed in such establishments, which sell goods or merchandise the greater part of which is in intrastate commerce, do not come within the purview of the Fair Labor Standards Act. White Motor Co. v. Littleton, 124 F. (2d) 92; Super-cold Southwest Co. v. McBride, 124 F. (2d) 90. Moverover, if the plaintiffs here had performed any service which was interstate they have signally failed to show to what extent this service was performed. Walling v. Goldblat Bros., 128 F. (2d) 778; Jax Beer Company v. Redfern 124 F. (2d) 172.

There is abundant evidence to be found in the record which supports the finding and decree of the court try-

ing the case without the intervention of jury, and the judgment is

AFFIRMED.

JUDGMENT

Extract from the Minutes of November 1, 1944.

GEORGE HARRIS, ET AL.,

No. 10841 versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

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ORDER EXTENDING TIME TO FILE REHEARING.

Extract from the Minutes of November 22, 1944.

GEORGE HARRIS, ET AL.,

No. 10841 versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY.

It is ordered that the time within which to file a petition for rehearing in this Court in the above numbered and entitled cause be extended for the period of 15 days from November 22, 1944.

(Signed) LEON McCORD

United States Circuit Judge.

Fort Worth, Texas.
Nov. 22, 1944.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

GEORGE HARRIS and ELLIS McDANIEL, APPELLANTS, VS. L. C. HAMMOND, OPERATING AS L. C. HAMMOND & COMPANY, APPELLEE.	NO. 10841 ERROR TO THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION.

APPELLANTS' MOTION FOR RE-HEARING

And now come the appellants in the above entitled cause, within the time allowed by the order of this Honorable Court, dated November 22, 1944, and respectfully moves the court for a re-hearing, upon the following grounds, to-wit:

-1-

Because, it is respectfully contended, that this Honorable Court has misconceived a pertinent and controlling legal question presented by appellants' appeal when on page two of its decision, the issue is stated as follows:

"The question for decision is whether these employees are within the coverage of 6 and 7 of the Act".-

Whereas the question involved is whether these employees are within the coverage of 6 or 7 of the Act; it appearing from the findings of the trial court, based upon the undisputed evidence, that appellants are entitled to recover under Section

6 of the Act, as to minimum wages. The finding of the trial court and the evidence in support of that finding being as follows:

On page 38 of the record the trial court finds: "One of the plaintiffs, McKay, spent one day each week soliciting orders and making collections in South Carolina . . . Another plaintiff, Harris, drove the truck for one day each week in South Carolina, making deliveries of goods sold to customers there, and when not so engaged, he hauled goods in the truck from the railroad to the store and unloaded and hauled goods into the warehouse . . . The third plaintiff, McDaniel, assisted the truck driver in the performance of his work".

The above findings of the court are based upon the following undisputed evidence of the plaintiffs.

Plaintiff Harris testified: "I was employed by L.C. Hammond & Company from October 23, 1938 to June 15, 1941. As such employee my duties was truck driver, I drove the truck to South Carolina delivering freight. This delivering and hauling took up practically all of my time. That was my job. The goods that came to Hammond & Company's store came in carloads and truck loads, and we hauled them out from railroad cars. I drove the truck and I had a helper, a warehouseman, Ellis McDaniel, would help me . . . The flour they bought came in car lots bought from brokers - five or six or seven of them would come there and sell goods. They would buy flour, nails, cements and such and various goods in carload shipments, that would come into Georgia from other States, and I would unload them from the railroad cars and put them in the warehouse." (R.pp.14-15).

The other plaintiff, Ellis McDaniel, testified: "I was in the employ of L.C. Hammond and Company from October 23, 1938 until August 1, 1942. I was warehouseman. The merchandise bought by Hammond & Company came into Augusta in trains, car boxes. George Harris and I would haul the stuff from the railroad to the warehouse. I helped to load the trucks and deliver the goods. My duties were hauling the goods into the warehouse and delivering the goods to customers of L.C. Hammond & Company, which took up all of my time. These shipments that came in were shipments from other States. L.C. Hammond & Company was conducting at the time a wholesale grocery and feed business. They bought their groceries from brokers, eight of them, they would buy flour, groceries, feeds and salt in carload lots, they also handle hardware and building cements and things like that". (R. pp. 16-17).

J. H. McKey, a salesman for defendant, but not a party to this appeal, testified: "I was in the employ of L. C. Hammond & Company from October 23, 1938 to December 28, 1939. It was my duty to spend the entire day on Mondays on the road in South Carolina as a salesman and collector . . . This list of retail merchants you hand me were customers of L.C. Hammond & Company in South Carolina and Georgia. They bought merchandise practically every week. This list of 153 merchants varied from time to time. L. C. Hammond & Company were wholesale merchants during the time of my employment, they also made some retail sales every day in the week. . . As to the amount of retail sales to farmers, I would say it would not run over 25%. As to the amount of retail business done with South Carolina farmers, it would be about 10% of its total business. I mean to say that 10% of it could have been retail

in South Carolina. I would say 90% wholesale and 10% retail". R.pp. 10-11).

2.

Because, it is respectfully contended, that this Honorable Court by its decision of November 1, 1944, has laid down as a rule of law that the appellants, as truck drivers and warehousemen of the defendant, are not covered by either 6 or 7 of the Act, and in view of the aforesaid finding of the trial court and the undisputed evidence quoted, said decision of this Honorable Court is contrary to the express provisions of the Act and the decision of the Supreme Court and of this court construing the Act.

"It is the character of services rendered by the employee, and not the business of the employer, which determines the applicability of the law". Walling vs. Jacksonville Paper Co., 317 U.S. 564; Kirschbaum vs. Walling, 316 U.S. 511; Collins vs. Kidd Dairy Co., 132 F.(2d) 79 - the latter decision being by this court.

-3-

Because, it is respectfully contended, that this Honorable Court has apparently overlooked and has made no ruling or reference to appellants' assignments of error, and particularly grounds 2, 3 and 4, which are set out and fully discussed in appellants' brief, and which we earnestly insist require a different ruling from that made in the case.

-4-

Because this Honorable Court on page 3 of its decision makes the following finding or statement of fact, which is

contrary to the undisputed evidence in the case and the finding of the trial court, to-wit: "Moreover, if the plaintiffs here had performed any service which was interstate, they have signally failed to show to what extent this service was performed".

The said finding is also contrary to the admission made by the defendant in the pleadings, the plaintiffs having alleged as follows, and which is not denied by the defendant, to-wit: "That in the operation of said business the defendant purchases in States other than Georgia and in wholesale quantities, goods, wares and merchandise which were transported to defendant by common carriers, and at all times herein mentioned it was and became the duty of plaintiffs to receive and assist in unloading the said goods from said common carriers, and to convey the same by truck into the warehouse of the defendant; that the defendant sells to customers in States other than Georgia and in wholesale lots, goods, wares and merchandise, and it was and became the duty of plaintiffs to assist in loading, checking and delivering said goods, wares and merchandise from defendant's warehouse". (R.pp. 2-6).

-5-

Because, as appellants respectfully contend, that while they may not be covered by the overtime provisions of the Act, they are clearly covered by Section 6 of the Act, based upon the former ruling of this Honorable Court and the Supreme Court. In the case of Reuter, Inc. vs. Walling, Admr., 137 F. (2d) 315, this Honorable Court held:

"A fruit and vegetable wholesaler's truck drivers and

their helpers when engaged in unloading produce from freight cars coming from out of the State and when engaged for substantial part of their time in hauling such produce from freight cars to wholesaler's place of business were covered by minimum wage provision of Fair Labor Standards Act, but truck drivers were not subject to overtime provisions of the act, Fair Labor Standards Act of 1938".

"A fruit and vegetable wholesaler's employees when engaged for substantial part of their time in preparing, selling, shipping, or delivering for shipment orders to out of state customers, or buying, jordering, paying for, keeping records on goods purchased from out of the state were covered by minimum wage and overtime provisions of Fair Labor Standards Act, Fair Labor Standards Act of 1938".

"The unloading activities carried on by employees at warehouses constitute part of the substantial incoming interstate movement of goods and such employees are therefore engaged in commerce within the meaning of the Act." Baltimore R.R. vs. Bartch, 263 U.S., 540, 544; Walling vs. Jacksonville Paper Co., 63 S.Ct. 332; 317 U.S. 564.

"That the purchase of goods destined for importation across State lines is interstate commerce, whether delivery is made to warehouses or directly to stores, is clear from the decided cases. "Federal Trade Commission vs. Pac.Paper Co., 273 U.S. 52: Brennan vs. Titusville, 153 U.S. 289; Caldwell vs. N.C. 187 U.S. 622, 632; Dozier vs. Ala., 218 U.S. 124.

The defendant Hammond himself testified: "Retail grocers and wholesale grocers are classified in Augusta Directories, looking at the 1929 City Directory I am classified as a wholesaler . . From

1938 right on through 1942 I am listed along with other exclusive wholesale grocers in Augusta . . . There has never been a time when I was not doing some wholesale business." (R.p. 262). See also Record p. 33-34, where defendant made a sworn statement that he was doing a wholesale business only.

WHEREFORE appellants respectfully pray that they be granted a rehearing and that a judgment be rendered in this case in accordance with the law and the facts.

Paul T. Chance

ATTORNEY FOR APPELLANTS

Due and legal service of a copy of the foregoing motion for a rehearing is hereby acknowledged.

All other and further notice and service waived.

This the 2nd day of December, 1944.

Curry & Curry

ATTORNEY FOR APPELLEE

STATE OF GEORGIA,)
RICHMOND COUNTY.)

I the undersigned, as counsel of record for the appellants, do hereby certify that after a careful examination of the decision of thes Honorable Court dated November 1, 1944, I do verily believe that the questions of law and fact referred to and set out in the foregoing motion for a rehearing were overlooked by the Court.

I further certify that on account of the limited time in which appellants had to present this motion, the same could not be printed and that the present appeal is in forma pauperis.

This the 2nd day of December, 1944.

Paul T. Chance

ORDER DENYING REHEARING.

Extract from the Minutes of December 15th, 1944.

GEORGE HARRIS, ET AL.,

No. 10841 versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

- - - - - - - - - - - - - - - - -

CLERK'S CERTIFICATE,
UNITED STATES OF AMERICA,
UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 57 to 72 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals forthe Fifth Circuit, in a certain cause in said Court, numbered 10941, wherein George Harris, et al., are appellants, and L. C. Hammond, operating and doing business as L. C. Hammond & Company is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the typewritten transcript of the record numbered from 1 to 56 are identical with the typewritten transcript of the record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of January A. D. 1945.

Oakley F. Dodd

Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

No. 881

FEB 23 1945

CHARLES ELMORE CROPLEY
CLERK

In The
United States Supreme Court

* * * *

GEORGE HARRIS AND ELLIS McDANIEL,
PETITIONERS

VERSUS

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND AND COMPANY,
RESPONDENT

* * * *

BRIEF OF RESPONDENT

* * * *

W. INMAN CURRY
JEFF D. CURRY,
Augusta, Georgia

CURRY & CURRY,
1219 S. F. C. Building,

Attorneys for Respondent.

I N D E X

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APPLICATION TO THE SUPREME COURT OF THE UNITED STATES

* * * *

FOR A WRIT OF CERTIORARI

* * * *

FROM THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

* * * *

GEORGE HARRIS AND ELLIS McDANIEL

PETITIONERS

VERSUS

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND AND COMPANY,

RESPONDENT

* * * *

STATEMENT OPPOSING GRANTING OF THE WRIT OF CERTIORARI

* * * *

L. C. Hammond, operating and doing business as L. C. Hammond and Company, files this his statement in opposition to petitioners' application for writ of

certiorari, and respectfully submits that the writ should not be granted for the following reasons:

(a) Because the evidence showed that the Respondent conducts and operates a retail establishment, and Petitioning employees were engaged in a retail establishment.

(b) Because, the evidence showed that the greater part of Respondent's selling was in intrastate commerce.

(c) Because, if Respondent, who neither manufactures nor produces goods for commerce should be held to be a wholesaler, the Petitioners would not be entitled to invoke the Act for all of the services rendered, but only for the services rendered by them that had some immediate relationship to interstate commerce.

(d) Because, the burden of proving Respondent a wholesaler, and the burden of proving the number of hours Petitioners were engaged in interstate commerce, rests upon Petitioners.

* * * *

BRIEF OF CURRY AND CURRY OPPOSING THE GRANT OF THE WRIT OF CERTIORARI

PART I.

STATEMENT OF THE CASE

The action in this case was brought by three former

employees of Respondent, George Harris, Ellis McDaniel, and J. H. McKey, but J. H. McKey is not a party to this appeal.

Augusta, Georgia is a city on the state line between Georgia and South Carolina. Aiken, Edgefield, and McCormick Counties in South Carolina are just across the river from Augusta. (See testimony of J. H. McKey on page 13 of the brief of evidence.)

Since 1931 the Appellee has operated a grocery and feed business in the city of Augusta. His place of business is located on the first or street level floor of a two-story building on the main business street in the retail district of the city. The second floor is given over to apartments where people dwell. The store is 30 or 40 feet wide and between 140 and 150 feet long. The front portion of it nearest the street and extending 35 or 40 feet towards the rear, contains shelves, counters, display cases and racks. Regular cash tickets are used for the various customers and as each customer makes his purchase, it is rung up on a cash register. The store has large plate glass windows, in front of which, on the sidewalk, goods are displayed in the usual manner of a retail grocery store. A partition, without a door, separates the front end from the rear. This partition was already in the building when Appellee rented the premises. The rear compartment is used as a warehouse and storage room principally for grain, hay and other foodstuffs of that type. The majority of Appellee's business is feeds. Most of it is sold to dairymen and poultrymen, weekly trade. Appellee does some wholesale business. Solicits one day out of a week. Only uses that one day to help the buying. He does not run a wholesale grocery store, never has.

They just buy in little larger quantities. Appellee came from South Carolina. His customers are in Georgia and in McCormick, Edgefield and Aiken County, South Carolina. These counties are in the Augusta business area.

No manufacturing, production, or processing of goods is undertaken by appellee. He does not even mix the feed which he sells.

During the years in controversy, the gross sales of Appellee were between a minimum of $90,000.00 and a maximum of $105,000.00 per year. "It would be impossible for a wholesale grocery to exist on a $105,000.00 business a year." (See brief of evidence page 25.)

Less 20% of Appellee's gross sales representing retail sales.

Some goods are sold and delivered to customers in South Carolina, but these sales would not exceed 15% or 20% of the gross sales.

According to statements made to credit agencies, Appellee's stock of merchandise varied from $15,000.00 to $18,000.00. His accounts receivable ran around $4,500.00.

Appellee operates only one truck. One day each business week this truck makes deliveries in the three South Carolina counties lying just across the river from Augusta. The truck driver and his helper, when going into South Carolina, leave the store around ten o'clock in the morning and return by three-thirty or four o'clock in the afternoon. "xxxThey would deliver

goods to not over 30 customers, probably less." These sales in South Carolina do not exceed 15% or 20% of Appellee's gross sales. No goods are shipped out by railroad.

All goods purchased by Appellee come to rest in his warehouse or storage room. They are never ordered on preexisting contracts or understandings with customers.

Occasionally Appellee and several other merchants together purchase a car of merchandise, and when the car arrives, the merchandise is distributed among the purchasers.

Appellee serves the public and sells indiscriminately to any one wishing to buy and who calls at his store, on the principle of first come, first served.

Between 100 and 150 customers are served at retail over the counter daily during the week, and on Saturdays about 500 customers are served in the same way.

A recent examination of Appellee's books show that he only has 45 customers who buy non-retail.

Appellee's records are in such shape that he can identify every sale made in South Carolina. (See Brief of Evidence, page 29).

In 1939 or 1940 an inspector from the Department of Labor, Wage and Hour Division, examined Appellee's records and inspected his store. He found the percentage of non-retail business in dollars at that time to be less than 20% of the whole and informed the Appellee that his business was not subject to the Fair Labor

Standards Act, being exempt under section 13(a) (2), (29 U.S.C. Sect. 213(a) (21) as a retail establishment, the greater part of whose selling was in intrastate commerce. A second inspector coming in later, confirmed the earlier inspector upon finding the so-called wholesale sales had not increased.

* * * *

PART II

OPINION OF JUDGE LOVETT

Lovett, J.

By consent of the parties this case was heard by the court as trior of the facts.

My findings and conclusions follow:

FACTS

The suit is by three former employees of defendant to recover unpaid minimum wages, overtime compensation, liquidated damages, attorney's fees and costs under the Fair Labor Standards Act of 1938. 29 U.S.C, Sec. 201, et seq.

Plaintiff McKey, who was paid $20 a week for his services, sues for overtime compensation, etc., from October 23, 1938 to December 24, 1939, alleging he worked 75 hours each week during that period. The plaintiff Harris, paid $11 per week for his services, alleges he worked 76 hours per week from October 23, 1938 to June 15, 1941. He sues for unpaid minimum wages, overtime, etc. Plaintiff McDaniel, paid $11 per week from Octob-

er 23, 1938 to April 15, 1941, $15 per week from April 15, 1941 to March 25, 1942 and $20 per week from March 25, 1942 to August 1, 1942, sues for unpaid minimum wages, overtime compensation, etc.

The question is whether these employees are within the coverage of sections 6 and 7 of the Act.

Since 1931 the defendant has operated a grocery and feed business in Augusta, Georgia, a city on the state line between Georgia and South Carolina. There is a dispute between the parties as to whether he conducted a retail establishment or was a wholesale grocer. He sold and delivered some goods to customers in South Carolina, where he lived before he entered business in Augusta, Georgia.

The defendant's place of business is located on the first, or street level, floor of a 2-story brick building on the main business street in the retail district of Augusta. The second floor is given over to apartments where people dwell. The store is 30 or 40 feet wide and between 140 and 150 feet long. The front portion of it nearest the street, and extending 35 or 40 feet towards the rear, contains shelves, counters, display cases and racks, a cash register and the usual equipment found in a retail grocery store. Photographs in evidence disclose that it has large plate glass windows, in front of which on the sidewalk and behind which goods are displayed in the usual manner of a retail grocery store. A partition without a door, already in the building when the defendant rented

the premises, separates the front end from the rear. The rear compartment is used as a warehouse and storage room, principally for grain, hay and other feed stuffs of that type. Entrance to the rear compartment is at or near the rear of the building. One entering the front door of the store from the street has a view of what would appear to be a retail grocery store.

No manufacturing, production or processing of goods for commerce is undertaken or done by the defendant. He does not even mix the feed which he sells.

During the years in controversy the gross sales of the defendant were between a minimum of $90,00 and a maximum of $105,00 per year. Less than 20% of the gross sales represent non-retail sales, or what the plaintiffs characterize as sales at wholesale. Not exceeding 15% or 20% represent sales of goods delivered to customers in South Carolina. According to statements made to credit agencies his stock of merchandise varied from $15,000 to $18,000. They reported him as both a retail and a wholesale grocer. His accounts receivable ran around $4,000. Among the principal customers of the defendant are dairymen, poultrymen and farmers owning cattle and live stock and who purchase feed stuffs in larger quantities than a retail grocery store ordinarily would sell. Some of these customers are in Georgia; some in South Carolina. Some South Carolina customers call at defendant's store and purchase and take delivery there, using their own trucks for the purpose. However, defendant operates one truck of his

own—and only one. One day each business week he makes deliveries in South Carolina with this truck. No goods are shipped out by railroad. On the side of defendant's one truck is painted defendant's name, followed by the words "Wholesale Grocer". He also used stationery and invoices on which the words "wholesale grocer" appeared. Occasionally he and others in the retail grocery business pooled their purchases and bought in quantities, carload lots, using his name to do so, and on arrival they parceled out the goods among themselves. All goods purchased came to rest in the warehouse portion of the store. They were not ordered on pre-existing contracts or understandings with customers in or out of the state, with the exception noted as to the pooling of purchases, though some of those from whom he bought were located and shipped the goods to him from without the state. On arrival he had no way of knowing whether the commodities he bought would be sold to any particular customer anywhere. He served the public and sold indiscriminately to any one willing to buy and who called at his store on the principle of first come first served. His business licenses from the state sometimes described him as a wholesale grocer and at other times simply as a grocer. In the City and telephone directories he was classified among the wholesale grocers. On the plate glass windows of his store appeared the words "L. C. Hammond & Company, Groceries and Feeds." There was also a sign extending over the sidewalk reading the same way. Between 100 and 150 customers daily during the week and on Saturdays about 500, admittedly buying at retail in small quantities, were

served over the counter in the front end of the store. His customers in South Carolina at no time exceeded 40 or 50 people. Over a period of years, counting both old customers to whom he no longer sold and the new and current ones, the number was larger.

An agent of Appellee spent one day each week soliciting orders and making collections in South Carolina, and for the balance of the week he worked in the store either in the warehouse space or in what for convenience, I shall call the retail department. He was not employed originally as a salesman to travel; he took over that work when the defendant himself had to give it up on account of ill health. Harris, drove the truck for one day each week into South Carolina making deliveries of goods sold to customers there, and when not so engaged hauled goods in the truck from the railroad delivery tracks to the store and unloaded and handled goods in the warehouse department (some of which came from without the state and carried packages from the retail department to the street curb to parked automobiles of customers. Mcdaniel, assisted the truck driver in the performance of his work. The truck driver and his helper when going into South Carolina would leave the store around ten o'clock in the morning and return by 3:30 or 4:00 o'clock in the afternoon, one day each week, usually on Wednesday, and en route to South Carolina would make deliveries in the State of Georgia if the business so required.

In 1939 or 1940 an inspector from the department of labor, wage and hour division, examined

the defendant's records and inspected his store. He found the percentage of non-retail, or wholesale, business in dollars at that time less than20% of the whole, and informed the defendant his business was not subject to the Fair Labor Standards Act, being exempt under section 13(a) (2), (29 U.S.C. Sec. 213(a) (2) as a retail establishment the greater part of whose selling was in intrastate commerce. A second inspector, coming in later, confirmed the earlier inspector upon finding the so-called wholesale sales had not increased.

DISCUSSION

There are two questions for decision. The first is are these employees engaged in a retail establishment, the greater part of whose selling is in intrastate commerce, with respect to whom by section 13(a) (2) of the Act sections 6 and 7 are made inapplicable. Secondly if they are not, if the defendant is a wholesaler, are these employees covered by the Act in all of their activities; were they wholly "in commerce" and entitled to invoke the Act for all of the services they rendered, or only where the services had some immediate relationship to interstate commerce. Collaterally there is the question of where the burden of proof rests.

It should be noticed we are dealing here with one who neither manufactures nor produces goods for commerce. A producer under the Act is treated very differently from one who merely sells either at wholesale or retail. As to the manufacturer or producer Congress made no distinction as to the volume or amount or shipments in the com-

merce or of production for commerce by any particular shipper or producer, provided it was substantial. It recognized that in present day industry competition by small concerns may effect the whole, and that the total effect of the competition of many small producers may be great. U.S. v. Darby, 312 U.S. 100, 123; Davis v. Goodman Lbr. Co., 133 F. 2d. 52, 53; Walling v. Peoples Packing Co., 132 F.2d 237(6); Ling v. Currier, 50 F. Sup.—: Samuels v. Houston, 46 F. Supp. 364, 366. It is different as to a retail establishment. By the express terms of the Act Congress said the provisions of sections 6 and 7 relating to minimum wages and overtime compensation should not apply with respect to "(2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce". Section 13(a) (2), 29 U.S.C. Sec. 213(a) (2). As to wholesalers, all phases of their business selling intrastate are not necessarily covered by the Act because the purchases are made interstate. Walling v. Jacksonville Paper Co., 317 U.S. 564; 570-71; Higgins v. Carr Brothers Co., 317 U.S.; Reuter v. Walling (5 Cir.).F.—— 2d——, decided July 22, 1943. "We can not be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. Congress did not exercise in this Act the full scope of the commerce power, as was stated in Kirschbaum v. Walling, 316 U.S. 517, 522-23. . There is, however, no indication in the legislative history that but for the exemption of retailers it was thought that all movements of goods from manufacturers to wholesalers and on to retailers would be 'in com-

merce' within the meaning of the Act, where the wholesalers and retailers were in the same state. It is quite clear that the exemption in Sec. 13(a) (2) was added to eliminate those retailers located near the state line and making some interstate sales . . . And the exemption for retailers contained in Sec. 13(a) (1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included . . .Hence we can not conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." Jacksonville Paper Company case, supra.

Therefore, we first turn to a consideration of defendant's activities.

Was he in any true sense a wholesaler doing an interstate business.

To establish that he was, the plaintiffs say he solicited retailers in South Carolina to buy goods from him one day each week; that he held himself out to some of his customers and to those from whom he bought as a wholesale grocer; his truck had those words painted on its sides; he was so listed in the telephone and city directories; his stationery and invoices so claimed—and that these facts are undisputed. On the otherhand, when we consider the kind of store he operated its appearance, customers, etc., the volume of his business, the amount of his inventory, the accounts receivable, etc., together with the fact that his quantity sales were less than 20% of his total sales, it seems

reasonably clear to me that in no genuine sense was he a wholesaler. Certainly his total quantity sales, and particularly his sales outside of the state, could not have kept him in business very long unless he had his sales at retail to add to them. The evidence is silent as to prices charged in cases where sales were made in quantity or at wholesale. It is fair to assume that some discount was allowed, but it is also conceivable that the customers in South Carolina may have been willing to pay Augusta retail prices if deliveries were made to their doors without cost to them. The defendant undoubtedly posed as a wholesaler in some relationships and for some purposes. I am inclined to think this he did in order to buy more cheaply rather than to sell to those who sell again, which is the ordinary test for determining if one is a wholesaler. It is the business activities, not what he calls himself, that should control. See White Motor Co. v. Littleton, 124 F. 2d 92; Prescription House, Inc., v. Anderson, 42 F. Supp. 874; Duncan v. Montgomery Ward & Co. 42 F. Supp. 879; Snavely v. Shugart, 45 F. Supp. 722; Zehring vs. Brown Materials, 48 F. Supp. 740. When it is remembered that all of the quantity sales of defendant in South Carolina were within a few miles of the city of Augusta, Georgia, within what might be called its retail trade territory, more or less in the same section from which he originally came and where his personal friends doubtless resided, that in the beginning and before the plaintiff McKey was employed the defendant himself personally drove his automobile one day each week into that trade territory and saw his customers in person, that he did not employ the

plaintiff McKey in the beginning as a salesman or solicitor and only because of ill health of the defendant himself did McKey take over that work, that the volume of such business was relatively small in dollar values, it seems clear to me that the quantity sales interstate were merely incidental to defendant's intrastate business, which intrastate business was predominently the thing out of which he made his living.

Were the plaintiffs engaged in a retail establishment? If so, they can not invoke the Act, for clearly by the dependable evidence it was shown the greater part of the selling by the establishment was intrastate.

If we look to the Interpretative Bulletins of the Administrator set up by the Act (Bulletin No. 6, June 1941) as an aid to the determination, which we may do not as conclusive but as having persuasive value because it is a contemporaneous construction by an officer charged with enforcement of the Act (U.S. v. American Trucking Ass'n. 310 U.S. 534, 540; Walling v. American Stores, 133 F. 2d 840, 843), we find the physical appearance and equipment of defendant's store as well as his manner of selling over the counter squarely within his description of a retail establishment. See Pars. 9 to 14.

The volume of sales retail and non-retail also bring him within the exemption according to the Administrator's bulletin. It is there said (par. 18): "For purposes of enforcement the Administrator will ordinarily consider the non-retail selling of an establishment to be substantial if the gross

receipts from such selling constitute more than one quarter (25 per cent) of the total gross receipts of the establishment". Feed establishments selling in large quantities and at a discount from the regular retail price are considered in the Bulletin (pars. 63 and 64). The Administrator applies the same 25% test to determine if their non-retail sales are substantial. He says "In some cases, however, an establishment sells feed, hay, fertilizer, etc. in large quantities and at a discount from the regular discount price. For example, feed is sold to feed **stores,** large commercial poultry and dairy farmers, urban users of horse feeds, non-farming feeding and fattening stations. In the ordinary case these sales are not retail sales, and if such sales constitute a substantial portion of the selling . . it may not be considered a retail establishment under the exemption. See par. 18 (the 25% par.) for a discussion of 'substantial'." (emphasis mine).

Some of our courts have reached the same conclusion where the non-retail or wholesale sales were casual, incidental or unsubstantial only. Prescription House v. Anderson, Duncan v. Montgomery Ward & Co., and White Motor Co. v. Littleton, supra. See also Stucker v. Roselle, 37 F. Supp. 864, 865 (8, 9), 867; Moses v. McKesson & Robbins, 43 F. Supp. 528 (2) 529. The only reported case where a different view was entertained seems to be Petway v. Dobson, 43 F. Supp. 277, by District Judge Davies of the Middle District of Tennessee. Some of the facts are strikingly like the case at bar. But there are also differences. Unlike here it was admitted that the larger pro-

portion of defendants' business was in interstate commerce, and twenty five percent of the total sales made were wholesale. Here the ratio is much lower.

The plaintiffs were engaged in a retail establishment the greater part of whose selling was in intrastate commerce.

This opinion might well end here. But there are other aspects of the case which for future guidance of the parties properly may be discussed briefly. One of them relates to the over-time compensation claimed by the truck driver and his helper while engaged in hauling goods from the railroad to defendant's warehouse, some of the goods coming from outside of the state. While so engaged for a substantial portion of their time, if the defendant had been a wholesaler, they would have been engaged in interstate commerce and within the coverage of the minimum wage provision of the Act but without the overtime provisions. Jax Beer Co. v. Redfern, 124 F. 2d 172, 174; Walling v. Goldblatt Bros., 128 F. 2d 778 (6), 782; Southland Gasoline Co. v. Bagley,——U. S. decided May 3, 1943; Walling v. Silver Bros Co. (1st Cir.)——F. 2d——, decided May 21, 1943; Reuter v. Walling, supra. How much of their time, however, was given to such hauling has not been shown. Where an employee works both interstate and intrastate he must point out what part of his work is given to each. Supercold Southwest Co. v. McBride, 124 F. 2d 90 (5), 92; Snavely v. Shugart, supra; Samuels v. Houston, 46 F. Supp. 364, 367; Bracey v. Luray, 49 F. Supp.

821 (9). On the other hand, if the defendant had been a wholesaler, and these employees during a given work week interchangeably engaged in work in a department involving only intrastate business and in another involving interstate commerce (even if it could be found here the business was sufficiently departmentalized as to segregate the two departments, which I think has not been shown) the employer would have been required to pay the wages prescribed by the Fair Labor Standards Act for the entire time worked, including time spent in the department involving intrastate business alone. Fleming v. Knox, 42 F. Supp. 948; Ling v. Currier Lbr. Co., supra.

CONCLUSIONS

1. The court has jurisdiction of the parties and the subject matter under section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. Section 216 (b).

2. By the express terms of section 13(a) (2) sections 6 and 7 of the Act are not applicable to the plaintiffs.

3. Judgement shall be for defendant. Let it be presented on notice.

This August 11th, 1943.

Archibald B. Lovett,

United States Judge.

PART III

DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, BEFORE SIBLEY, HUTCHESON, AND McCORD, CIRCUIT JUDGES.

McCORD, Circuit Judge: This suit is by three former employees of the defendant to recover unpaid minimum wages, overtime compensation, liquidated damages, attorneys' fees and cost under the Fair Labor Standards Act of 1938. 29 U. S. C. Sec. 201 et seq.

The evidence is set out at length in a well considered opinion by the trial judge. **Harris v. Hammond,** 51 Fed. Supp. 91.

The question for decesion is whether these employees are within the coverage of Sections 6 and 7 of the Act: "The provisions of Sections 6 and 7 shall not apply with respect to (1) any employees employed in a **bona fide** * * * local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by the regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 29 U. S. C. A. 213 (a) (1) and (2).

L. C. Hammond was neither a manufacturer nor did he produce goods for commerce. Since the year 1931 he had operated a grocery and feed business at Augusta, Georgia, which is located on the State line between Georgia and South Carolina. While he sold feed to dairy customers, the majority of his sales was made to customers who entered his store. He had a limited number of customers in South Carolina, but a very large

majority of his customers numbering between 100 and 150 each day and about 500 on Saturdays, entered his store and bought groceries over the counter. He owned and operated only one delivery truck and this truck was used only a part of one day each week by two employees in delivering groceries in South Carolina.

The evidence is without dipute that the gross sales of the Hammond business for several years past had been between $90,000 and $105,000 per year; that no wholesale grocery business could survive on such yearly sales. Moreover, his stock of goods varied from $15,000 to $18,000, and the accounts receivable ran around $4,000; and his grocery store was like other retail grocery stores in that section.

In the year 1939 or 1940 an Inspector from the Department of Labor, Wage and Hour Division, examined the Hammond records and inspected his store and found the percentage of non-retail or wholesale business in dollars, at that time, less than 20% percent of the whole, and informed the defendant that his business was not subject to the Fair Labor Standards Act, being exempt as a retail establishment "the greater part of whose selling was intrastate commerce." A second inspector coming in later, confirmed the earlier inspector upon finding the so-called wholesale sales had not increased.

The law is now well settled that those engaged in and employed in such establishments, which sell goods or merchandise the greater part of which is in intrastate commerce, do not come within the purview of the Fair Labor Standards Act. **White Motor Co v. Littleton,** 124 F. (2d) 92; **Super-cold Southwest Co. v. McBride,**

124 F. (2d) 90. Moreover, if the plaintiffs here had performed any service which was interstate they have signally failed to show to what extent this service was performed. **Walling v.Goldblat Bros.,** 128 F. (2d) 778; **Jax Beer Company v. Redfern,** 124 F. (2d) 172.

There is abundant evidence to be found in the record which supports the findings and decree of the court trying the case without the intervention of jury, and the judgment is AFFIRMED.

* * * *

PART IV

STATUTE THAT EXEMPTS PETITIONERS FROM THE PROVISIONS OF THE ACT

> "The provisions of sections 6 and 7 shall not apply with respect to***any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce,***"
>
> Section 13(a) (2) of the Fair Labor Standards Act of 1938.

* * * *

PART V

DISCUSSION

THAT HE CONDUCTS AND OPERATES A RETAIL ESTABLISHMENT, AND APPELLANT EMPLOYEES WERE ENGAGED IN A RETAIL ESTABLISHMENT.

RETAIL ESTABLISHMENT CHARACTERISTICS

In an Interpretative Bulletin issued December 1938, Revised June 1941, and designated Interpretative Bulletin No. 6, the Administrator undertakes to set out the physical characteristics of a retail establishment, as follows:

(a) Sales clerks are employed to assist customers in making their purchases.

(b) Retail establishments usually have counters, cash registers to ring up sales, shelves for the display and convenient arrangement of merchandise.

(c) Display windows to attract the patronage of the general public.

(d) They maintain a stock of merchandise on hand and normally make sales over the counter from such stock.

(e) They do not have manufacturing equipment or other machinery normally found in factories.

(f) It is characterized by numerous small sales.

(g) It sells merchandise in small quantities and at prices which are higher than the prices involved in sales by wholesalers or jobbers.

(h) It is patronized regularly by the general consuming public.

In the same Bulletin, the Administrator specifically recognizes Appellee's store as a retail estabblishment, when, in paragraph 63 of said bulletin, he says:

> "We have received many inquiries regarding the applicability of section 13(a) (2) to small country feed stores. These establishments, which are engaged in the distribution of feed, hay, fertilizer and similar products,—frequently also sell a variety of other products such as flour, coal, hardware, building supplies, etc. Sales made to the farmers in the vicinity in small quantities for their own use and at regular retail prices. In our opinion, such sales are properly to be considered as retail sales."

In the case of White Motor Company v. Littleton, 124 Federal (2nd) 92, at h.n. 1, the Court defines the word "retail" as follows:—

> "The word 'retail' in common and ordinary acceptation, when used in sales parlance, means a sale in small quantity or direct to the customer, as distinguished from the word 'wholesale' meaning a sale in large quantity to one who intends to resell, and the character of the sale is not altered by the use to which the consumer may put the purchased commodity. (See White Motor Co. vs. Littleton, 124 Fed. (2d.) 92.)"

Mr. McKey, one of the original plaintiffs, testified on this subject, generally as follows:

That there are show windows on either side of the front door; that there are counters and shelves in the store; that they have a cash register; that as the cash customers are making their purchase they are rung up; that this is done every day; that he waited on the retail trade in the store every day in the week except one (see page 13 of the transcript of evidence); that just in front of the store are shelves, and a place for display;

that they sell goods off the shelves, like A & P and Rogers; that anybody that wants to can go there and buy groceries, sardines and other groceries at retail. (See page 16 of the transcript of evidence).

Mr. Harbeson, a witness introduced by Appellants, on cross examination, testified as follows: That his place of business is just three or four doors above Mr. Hammond's; that Mr. Hammond sells at retail; that he sees customers in the Hammond store every day; that Mr. Hammond conducts a regular retail business, just like his. (See page 29, transcript of evidence).

Mr. Hammond testified generally as follows:

That he conducts and operates a grocery and feed business; that the majority of his business is feeds; that he sells most of it to dairymen and poultrymen; that he does a small amount of wholesale business; that he does not run a wholesale store; that he bought wholesale from merchants in Augusta; that he has counters, shelves, a cash register; that they ring up cash sales; that on the run of a day, through the week, his retail customers would average 150; that on Saturdays they would average 500; that he has not more than 35 wholesale customers on his books; that he has no warehouse, just a store that fronts on Broad Street, 30 or 40 feet on Broad and probably 140 or 150 feet deep; that it is a one story store; that he operates one truck; that in 1939, 1940, 1941, his busines would run around $90,000.00 a year; that one year his business ran as high as $105,000.00; that it would be impossible for a wholesale grocer to exist on $105,000.00 a year's business. (See transcript of evidence from page 32 to 43.)

Mr. F. B. Bailey testified generally that he made a

recent examination of the books of the company and that the company had only 45 wholesale customers: (See page 45 transcript of evidence); that according to the register it shows an average of from 100 to 150 retail sales a day except Saturdays when it shows 500. (See transcript of evidence page 46).

GROSS RECEIPT TEST FOR DETERMINING WHETHER AN ESTABLISHMENT IS WHOLESALE OR RETAIL.

"The foregoing discussion indicates the principal attributes of a retail establishment for purposes of section 13(a) (2). Minor discrepancies, of course, will not defeat the exemptions. Major variations from the patterns, however, do indicate that the exemption is inapplicable. Thus for example an establishment which makes some non-retail sales nevertheless would be considered a retail establishment if the gross receipts from nonretail sales are not substantial in relation to the total gross receipts of the establishment. For purposes of enforcement the administrator will ordinarily consider the nonretail selling of an establishment to be substantial if the gross receipts from such selling constitutes more than one-quarter (25 per cent) of the total gross receipts of the establishment."

> Wage and Hour Interpretative Bulletin No. 6, section 8.

The decision of many of our courts have followed the interpretation of the Administrator in this regard, and among these, are the following:—

Whetson v. Wexler, Chancery Court of Tennessee, Reported 3 Labor Cases 60, 283; Russo v. Fisher, Muni-

cipal Court of Pa., Reported 4 Labor Cases 60, 502; Soleim v. Tuverson et al., (Wis. Circuit Court, Douglas Cty; Earl B. Stucker v. Tony F. Roselle, United States District Court, District of Kentucky, 37 Fed. Supp. 864; Walling v. Wieman Co., 52 Fed. Supp. 131; Bynum v. Firestone Tire and Rubber Co. (Tenn. Ct. of App., W. D.)

We are not unmindful of the fact that courts are not bound by the interpretations placed upon an Act by an Administrator, but we do submit that the interpretation here made is a reasonable one and that the courts might well make the same interpretation.

"I am kookkeeper for L. C. Hammond and Company. I was in 1938 and have been for 12 years. The Wage and Hour people came to inspect the books. He stayed there about two days. He made an average of the retail and wholesale sales and said the percentage of wholesale was slightly under 20,% yes, sir, he came in since then and said the wholesale business had not increased." (See testimony of F. P. Bailey, page 27 brief of evidence).

The only effort made to impeach the 20% wholesale testimony was given by one of the original plaintiffs in the case, Mr. J. H. McKey, who testified generally;— that Appellee was a wholesale merchant; that he made some retail sales every day in the week; that they were always bigger on Saturdays; that the sales were made particularly to farmers living in South Carolina, Appellee's home state, where some of his relatives are; that he thought the amount of retail sales to the farmers would not run over 25%; that the amount of retail business done for the South Carolina farmers would be

about 10% of his total business and that 90% was wholesale.

"The Court: May I ask, how do you know that? A. I could not say exactly—The Court: Let me understand you. Did you have access to their

books and records: Why are you saying that; do you really know whether they sold $100.00 worth a month? A. No, sir. The Court: I confess, Mr. Chance, you are not making a very impressive witness of him, about sales. He does not seem to know anything about it except what he did himself. I do not see at this time how this evidence will benefit me much."

"Witness J. H. McKey:—I would not know enough to give you a correct figure and I have given you my estimate, this retail business was mostly to farmers in South Carolina. It was a kinder supply business to customers—a barrel of flour, side of meat or tub of lard. Some of it would be individual and some for their hands."

* * * *

THAT THE GREATER PART OF HIS SELLING WAS IN INTRASTATE COMMERCE.

The phrase, "the greater part of whose selling is in intrastate commerce," has been interpreted by the administrator to mean that more than 50 per cent of the sales be in intrastate commerce.

See Wage and Hour First Annual Report. 1939, page 21.

On pages 50 and 51 of the transcript of evidence and while Mr. F. B. Bailey, the bookkeeper, was on the stand testifying for the defendant, the Court asked this question:

"Call it an average of $100,000.00 for 1939, 1940, 1941, and 1942, listen carefully. Lumping your wholesale and retail sales together, calling it all one business and counting deliveries at your store to South Carolina customers in the same fashion as Georgia residents, but putting on this side deliveries you made in South Carolina—I understand all of that was by truck—how much of the $100,000.00 annual sales would you say represented sales not only direct to people in South Carolina but goods you delivered there by truck; how much of that $100,000.00 would you say represented that kind of business?"

Mr. Bailey answered as follows:

"That would be purely an estimate, but it would be I would say 15 or 20%. Not over that."

It will thus be seen that the employer conducts and operates a retail establishment and that not over 15% or 20% of his sales are in interstate commerce, therefore, the greater part of his selling is in intrastate commerce and his establishment is exempt from the provisions of the Fair Labor Standards Act.

Our own Circuit Court of Appeals has construed this statute with reference to the greater part of the selling or servicing being in intrastate commerce, and in the case of White Motor Company v. Marion C. Littleton et al., decided December 12, 1941, and reported in 124

Federal (2d), page 92, the Court, at head note No. 3, said:

> "Where employer sold products manufactured elsewhere, serviced and performed specified changes in the products and conducted repair and reconditioning department, and over 70 per cent of employer's sales were made direct to consumers, and although approximately 80 per cent of servicing performed was interstate over 90 per cent of selling was intrastate, and evidence indicated that servicing was more or less supplementary to sales and of business, employer was within exemption provided by Fair Labor Standards Act in favor of a "retail" or "service establishment", the greater part of whose selling or servicing is in "intrastate commerce" regardless of whether the phrase "selling or servicing" was a conjunctive or disjunctive phrase. Fair Labor Standards Act 1938, Section 1 et seq., and Sections 6, 13(a) (2), 16(b), 29 U.S.C.A. Section 201 et seq., and Sections 206, 213(a) (2), 216 (b)."

In the case of Super-Cold Southwest Co. v. McBride, another case from the Circuit Court of Appeals for the Fifth Circuit, decided January 15, 1942, and reported in 124 Federal (2d) page 90, the Court at head note No. 2, said:

> "A retail dealer, the greater part of whose selling is in intrastate commerce, is exempt from minimum wage and maximum hour provisions of Fair Labor Standards Act, notwithstanding that dealer's sales are made to commercial rather than to private users. Fair Labor Standards Act of 1938,

Sections 13(a) (2), 16, 29 U.S.C.A. Sections 213 (a) (2), 216."

In the case of Stucker v. Roselle, U.S. District Court, W. D. Kentucky, decided February 25, 1941, and reported in 37 Federal Supplement, page 864, the court, at head notes No. 8 and No. 9, said:

8. "One engaged in hat cleaning and reblocking conducted a "service establishment" within terms of Fair Labor Standards Act, and hence was exempted from minimum wage requirement where approximately 75 per cent of his business was intrastate business. Fair Labor Standards Act of 1938, Sections 6, 7, 13, 29 U.S.C.A. Sections 206, 207, 213."

9. "In ordinary language, the "greater part" means more than 50 per cent of the whole, where two parts only are being considered, and hence where 75 per cent of employer's business was in intrastate commerce, such business was the "greater part" of the whole so as to exempt employer from minimum wage requirements of Fair Labor Standards Act, though substantial portion of his business was interstate. Fair Labor Standards Act of 1938, Sections 6, 7, 13, 29 U.S.C.A. Sections 206, 207, 213."

In the case of Keith Ellinger v. The Goodyear Tire and Rubber Company, U. S. District Court, Northern District of Iowa, Western Division, decided June 6, 1941, and reported in Commerce Clearing House Labor Cases, page 60, 534, the court had under consideration an employee engaged in a gasoline service station

whose greater volume of income was derived from local and intrastate business and the court said:

> "As a conclusion of law the Court finds and declares that the defendant, because of the character, classification and volume of its business as found by the Court, was exempt from the provisions of Section 6 and 7 of the Act relative to maximum hours of actual service and minimum wage provisions."

In the case of Mansell Dotson v. A. K. Stowers, U. S. District Court, Southern District of West Virginia, Charleston Division, decided April 15, 1941, reported in Commerce Clearing House Labor Cases, Vol. 4, No. 60, 442, the Court had under consideration a case where the defendant operated a lumber business in connection with his retail grocery business. He owned a number of trucks and delivered lumber to purchasers in any amount. He sold 671,040 feet of lumber from Oct. 24, 1938 to May 31st, 1939. 43,004 feet of this was sold and shipped out of the State; the Court said:

> "I hold, as a conclusion of law, that the defendant, Stowers, was engaged in the retail lumber business alone, and that the plaintiff, Dotson was engaged in a retail and service establishment, the greater part of whose selling and servicing was in intrastate commerce. I hold that the defendant, Stowers, was not engaged in interstate commerce."

In the case of Earnest Ridley v. The General Cab Company of Nashville, Inc., Tennessee Chancery Court, decided February 10, 1942, reported in Commerce Clearing House Labor Cases, Vol. 5, No. 60, 951,

the Court had under consideration a cab company that derived the greater part of its revenue from its intrastate business, the Court said:

> "That as hereinbefore stated, the greater part of defendant's servicing is in intrastate commerce, therefore, under the provisions of Sec. 13(a) (2) of the Fair Labor Standards Act,, Sect. 6 of said Act does not apply to the complainant, and his bill must be dismissed."

In the case of Super-Cold Southwest Co. v. McBride, 124 Fed. (2nd) 90, at h.n. 2, the Court said:

> "A retail dealer, the greater part of whose selling is in intrastate commerce, is exempt from minimum and maximum hour provisions of Fair Labor Standards Act, notwithstanding that dealer's sales are made to commercial rather than to private users."

In the case of Walling, Adm'r. Wage and Hour Division, U.S. Dept. of Labor v. Wieman Co., 52 Fed. Supp. 131, the Court at h n. 6, said:—

> "Sixteen retail stores and general office and warehouse building all located within the state together constituted a single 'retail establishment' within exemption of Fair Labor Standards Act, and office employees who devoted more than 88% of their time to work incident to employer's retail functions were exempt from Wage and hour provisions of Act, though their work also involved the procuring of merchandise from outside the state."

In giving consideration to this particular discussion,

we should keep in mind the statement made by the Supreme Court of the United States in the case of Walling vs. Jacksonville Paper Company, 317 U.S. 564 at 571, (87 L. ed. 467) where it said:

> "It is quite clear that the exemption in Sect. 13(a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales. 83 Cong. Rec. 75th Cong., 3d Sess. Pt. 7, pp. 7281, 7282, 7436, 7438."

* * * *

THAT, IF APPELLEE, WHO NEITHER MANUFACTURES NOR PRODUCES GOODS FOR COMMERCE, SHOULD BE HELD TO BE A WHOLESALER, THE APPELLANTS WOULD NOT BE ENTITLED TO INVOKE THE ACT FOR ALL OF THE SERVICES THEY RENDERED, BUT ONLY FOR THE SERVICES RENDERED BY THEM THAT HAD SOME IMMEDIATE RELATIONSHIP TO INTERSTATE COMMERCE.

"It should be noticed we are dealing here with one who neither manufactures nor produces goods for commerce. A producer under the Act is treated very differently from one who merely sells either at wholesale or retail. As to the manufacturer or producer Congress made no distinction as to the volume or amount or shipments in the commerce or of production for commerce by any particular shipper or producer, provided it was substantial."

(See opinion of Judge Lovett on page 40 of the record).

It should also be noticed that the Appellant, Harris,

drove the truck to South Carolina only one day a week, and that Appellant, McDaniel was a helper on the truck only that one day a week.

It should also be noticed that Appellee's records are so kept that every sale made in South Carolina can be identified. "My records are in such shape that I can identify every sale made in South Carolina and every one made by McKey." (See testimony of F. P. Bailey, page 29 brief of evidence).

* * * *

THAT THE BURDEN OF PROVING APPELLEE A WHOLESALER, AND THE BURDEN OF PROVING THE NUMBER OF HOURS APPELLANTS WERE ENGAGED IN INTERSTATE COMMERCE, RESTS UPON APPELLANTS.

> "An employer suing under the Fair Labor Standards Act has burden of showing by fair preponderance of evidence that he was while in the employ of the defendant employer engaged in commerce or in the production of goods for commerce."
>
> Muldowney v. Seaberg Elevator Co., Inc., 39 F. Supp. 275, h.n. (2).

In the case of Super-Cold Southwest Co. v. McBride, 124 Fed. 2d, 90, at head note 5, the Court said:

> "An employee suing under minimum wage provisions of Fair Labor Standards Act, and working in both interstate and intrastate commerce, must point out what part of his work was in intrastate and what part in interstate commerce."

In the case of White Motor Co. v. Littleton, already referred to in this brief, Judge Hutcheson specially concurred in the opinion, and at page 94, said:

> "In addition to the reason given in the opinion for reversing the judgment of the trial court, I think it clear that it must be reversed, because of the complete failure of the proof to show how much of the work done by plaintiff was in interstate and how much in intrastate commerce. There was some testimony that some of the plaintiffs did some work in 'commerce'. But it is clear that by far the greater part of the work done by them was not. An employee doing work both in inter- and intra- state commerce must point out, with sufficient definiteness to rest a finding on what part of his work was in interstate and what part in intrastate commerce."

The principle here contended for was declared in the case of Samuels v. Houston, 46 Federal Supplement, page 364, where the court, at page 367, said:

> "I conclude that the plaintiff has failed to carry the burden the law places on him of showing by a fair preponderance of the evidence that a substantial part of his work was in commerce or in producing goods for commerce, so as to be entitled to the benefits of the Act of Congress on which he relies."

In the case of Spier v. Gulf Coast Beverages, Inc., (D.C. S.D. Florida) 50 Fed. Supp. 653 at h.n. 2, the Court said:

> "Evidence regarding employees' interstate acti-

vity and amount of overtime, which consisted of speculation, guess and averages made up from recollections, did not warrant judgment for overtime compensation under the Fair Labor Standards Act of 1938, 29 U.S.C.A. Sect. 201 et. seq."

* * * *

EXAGERATED AND MISLEADING STATEMENTS MADE IN THE PETITION FOR CERTIORARI AND IN THE BRIEF FILED IN SUPPORT OF THE PETITION.

1. In paragraph Two of the petition for certiorari and in the brief filed in support thereof, petitioners attempt to mislead the Court into believing that respondent operated a Wholesale Grocery Business, because, on two occasions he applied for and secured a Wholesale License or Permit. The evidence showed, and Judge Lovett so found that,—"His business licenses from the State sometimes described him as a wholesale grocer and at other times simply as a grocer."

2. Again, in paragraph Two of the petition of certiorari and in the brief filed in support thereof, petitioners attempt to mislead the Court into believing that respondent conducted and operated other than the small establishment disclosed by the evidence, in that he used more than one truck.

Mr. Hammond testified that,—"I have only one truck." (R. 21). In this connection, Judge Lovett found as follows:—"However, defendant operates one truck of his own—and only one."

3. Again, in paragraph Two of the petition for certiorari and in the brief filed in support thereof, petition-

ers attempt to mislead the Court into believing that respondent advertised himself as a wholesale merchant in the Augusta City Directory and in the Augusta Telephone Directory, when, as a matter of fact, the evidence in the case showed that respondent did no advertising whatsoever, and that his place of business was simply classified in the two directories under Wholesale Grocers.

4. Again, in paragraph Two of the petition for certiorari, and in the brief filed in support thereof, petitioners attempt to mislead the Court into believing that respondent's only retail business was done in an office space measuring 35 x 40 feet, when, as a matter of fact, respondent had no office and the 35 x 50 feet referred to was the front part of respondent's store from which he conducted his retail business.

Mr. E. C. Hammond testified as follows:

> "I do some wholesale business, a small amount, solicit one day out of a week. I do not run a wholesale grocery store, never have. Only use that one day in the week to help with the buying. They just buy in little larger quantities and we furnish them; no wholesale business." (R. 20).
> "I have counters and shelves in my store and a cash register, and I ring up the cash sales. On the run of the day through the week I would say they would average 150. I would say 500 on Saturdays.***. I have no warehouse. Just a store that fronts right on Broad Street, it is probably 140 or 150 feet deep. That is all the place of business I have and all the merchandise I serve is in that place. I serve all the retail trade in that place, it

is about 30 or 40 feet wide, one story. It is occpied by a residence overhead and I occupy only one floor." (R. 21).

"As to the cash registers and counters I spoke of and how much space they took up, I would say 35 or 40 feet, the balance of it is for storage warehouse and feed. (R. 22).

"We don't do any advertising. As to the public knowing what kind of business I run, they see the stuff displayed all over the store, a pound of this and a pound of that and tobacco and the whole front of the store is made up of broken packages. The front of any wholesale business has to have an office**. We don't have an office***."

5. Again, in paragraph Two of the petition for certiorari, and in the brief filed in support thereof, petitioners attempt to mislead the court into believing that respondent has a very large business in that it extends through a city block, when, as a matter of fact, the evidence showed that the store did not extend through the block and that it was only 140 or 150 feet deep.

In this connection, Mr. Hammond testified that,—"My store and storage room do not run all the way from Broad Street through to Jones Street. There is a vacant lot in the back but no building between my store and Jones Street."

6. Again, in paragraph Two of the petition for certiorari, and in the brief filed in support thereof, petitioners attempt to mislead the Court into believing that respondent had at one time 153 wholesale customers, when, as a matter of fact, respondent never had at any

one time more than about 45 wholesale customers.

In this connection, Mr. McKey, one of the original plaintiffs, testified on cross-examination, that while he had testified on direct examination that the 153 retail merchants were active, he had gone to work for respondent in 1936 and what he meant was that sometime during the period throughout his entire employment, the 153 listed persons had been customers of respondent, but that a great many of them had ceased to do business with respondent in 1938. (R. 13).

Mr. Bailey, a witness for the respondent, testified that he had examined the list that Mr. McKey had testified to on direct examination and that there are more than 100 names that were on the books in 1937 and have long ago been discarded and we never see them any more, and they were not customers at all when the law went into effect in 1938, and that he had recently examined the books to see how many wholesale customers they had and that they only had 45 such cussomers. (R. 27).

7. Again, in paragraph Two of the petition for certiroari, petitioners complain that "during the trial of the case in the District Court and while petitioners were proceeding to prove by retail merchants, who were customers of the respondent, the volume of wholesale business done by respondent in commerce, his Honor, the District Judge, cut short petitioners' proof by ruling that he would limit such proof to three witnesses.

Petitioners say that they excepted to such ruling, but the record does not show that they did, but the record

does show that petitioners only offered two (2) witnesses for the purpose, Mr. Harbeson and Mr. Lively, so the ruling of the court could not have been harmful to petitioners.

8. Again, in paragraph Two of the certiorari, petitioners complain that during the trial, his Honor, the District Judge, elicited from respondent testimony that a Wage and Hour Inspector had examined his books and found.that he did less than 25% wholesale business.

The record does not show that petitioners moved for a mistrial on account of the Judge eliciting the testimony from the witness, nor does it show any other form of exception or objection.

CONCLUSION

In concluding this discussion, we respectfully submit that Judge Lovett, with all the facts before him, found as follows:

(a) "The plaintiffs were engaged in a retail establishment the greater part of whose selling was in interstate commerce."

(b) "By the express terms of section 13(a) (2) sections 6 and 7 of the Act are not applicable to the Plaintiffs."

The Circuit Court of Appeals on the original hearing of an Appeal, and again on re-hearing, approved these findings. There was ample evidence to support the

findings, and we submit that the petition for certiorari should be denied.

Respectfully submitted,

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